

**APPENDIX**

JAN 8 1968

JOHN F. DAVIS, CLERK

**Supreme Court of the United States**

**OCTOBER TERM, 1967**

**No. 876**

**EDDIE M. HARRISON, PETITIONER**

**vs.**

**UNITED STATES**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**PETITION FOR CERTIORARI FILED AUGUST 25, 1967  
CERTIORARI GRANTED DECEMBER 4, 1967**

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 876

EDDIE M. HARRISON, PETITIONER

*vs.*

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

Holding a Criminal Term

Grand Jury Impanelled on February 25, 1960,  
Sworn in on March 1, 1960

Criminal No. 365-'60  
Grand Jury No. 427-60

Violation: 22 D.C.C. 2401  
(Murder in the First Degree)  
22 D.C.C. 2401

(Murder in the First Degree—Killing  
while perpetrating the crime of robbery)

THE UNITED STATES OF AMERICA

v.

EDDIE M. HARRISON, ORSON G. WHITE,  
JOSEPH R. SAMPSON

INDICTMENT—Filed April 19, 1960

The Grand Jury charges:

On or about March 8, 1960, within the District of Columbia, Eddie M. Harrison, Orson G. White and Joseph R. Sampson, purposely and with deliberate and premeditated malice, murdered George H. Brown by means of shooting him with a shotgun.

**SECOND COUNT:**

On or about March 8, 1960, within the District of Columbia, Eddie M. Harrison, Orson G. White and Joseph R. Sampson, unlawfully and feloniously did murder George H. Brown by means of shooting him with a shotgun, while attempting to perpetrate the crime of robbery.

/s/ Oliver Gasch

Attorney of the United States in  
and for the District of Columbia.

**A TRUE BILL:**

/s/ William E. W. Howe  
Foreman.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 365-60

UNITED STATES OF AMERICA

*vs.*

EDDIE M. HARRISON, ET AL., DEFENDANTS

Washington, D. C.  
October 5, 1960.

The above-entitled cause came on for further hearing before THE HONORABLE BURNITA SHELTON MATTHEWS, United States District Judge, at 10:00 o'clock, a.m.

APPEARANCES:

FREDERICK G. SMITHSON, ESQ., Asst. U.S. Dist. Atty.  
For the Government.

PERRY W. HOWARD, ESQ.,  
For Defendant Harrison.

L. A. HARRIS, ESQ.,  
For Defendants White and Sampson.

THE COURT: \* \* \*

All right, well, there being no opposition, I will grant the motion. Count 1 is dismissed.  
\* \* \*

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Criminal No. 365-60

Charge First Degree Murder

UNITED STATES

vs.

1—EDDIE M. HARRISON, DEFENDANT.

PLEA OF DEFENDANT—Filed April 22, 1960

On this 22nd day of April, 1960, the defendant Eddie M. Harrison, appearing in proper person and by his attorney Perry W. Howard, being arraigned in open Court upon the indictment, the same being read to him, pleads not guilty thereto.

The defendant is remanded to the District Jail.

By direction of  
RICHMOND B. KEECH  
Presiding Judge  
Criminal Court # 1

HARRY M. HULL, Clerk

By /s/ W. G. Dodd  
Deputy Clerk

Present:

United States Attorney

By VICTOR CAPUTY

Assistant United States Attorney

T. O'NEAL  
Official Reporter

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 365-60

UNITED STATES OF AMERICA

v.

EDDIE M. HARRISON, ORSON G. WHITE,  
JOSEPH R. SAMPSON

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER—Filed October 4, 1961

This matter came on for hearing before me on September 14, 1961, on orders from the United States Court of Appeals of the District of Columbia Circuit as to each of the three defendants, said orders dated July 21, 1961, with direction by the United States Court of Appeals to entertain a motion by each defendant to vacate and set aside judgment and award a new trial provided that such motion is filed on or before July 31, 1961. Pursuant to such orders, this hearing was duly held and the following constitutes the findings of fact, conclusions of law and order of this Court.

STATEMENT OF FACTS

1. The defendants, Eddie M. Harrison, Orson G. White and Joseph R. Sampson, were indicted on April 19, 1960, in a two-count indictment, charging murder in the first degree, a violation of Title 22, D. C. Code, Section 2401.

2. The defendant Eddie M. Harrison was represented by Mr. Perry W. Howard, a member of the bar of this Court and since deceased. The defendants Orson G. White and Joseph R. Sampson were represented by a person who indicated he was "L. A. Harris" and who entered his appearance on behalf of the defendant Sampson on April 29, 1960, and on behalf of defendant White on September 14, 1960. This indictment came on for trial on September 26, 1960, resulting in a verdict of guilty

on Count Two of the indictment on October 19, 1960, before this Court.

3. The defendant Eddie M. Harrison was represented throughout all preliminary proceedings, the course of the trial and the verdict of the jury by Mr. Howard. A motion entitled "Motion for New Trial and Arrest of Judgment" was filed on behalf of all defendants by the person represented to be L. A. Harris and by Perry W. Howard. However, Mr. Howard died on February 1, 1961, prior to argument. Subsequently, at the request of the defendant Eddie M. Harrison, the person of the supposed L. A. Harris was appointed by this Court to represent the defendant Harrison and to argue the motion for new trial and arrest of judgment on his behalf as well as that of the defendants White and Sampson. This motion was heard and subsequently denied on March 27, 1961.

4. Each of the defendants was sentenced on April 21, 1961, to death by electrocution. The defendants' applications to proceed on appeal without prepayment of costs was granted on April 21, 1961. While these appeals were pending, information was brought to the attention of the United States Attorney's office for the District of Columbia that the purported attorney for the defendants, utilizing the name of L. A. Harris, was not the person of Lawrence Archie Harris, a duly qualified and admitted member of the Bar of the District of Columbia, but in fact was an impostor, who fraudulently used the name of "L. A. Harris" and falsely represented himself to be the real Lawrence Archie Harris.

5. As reflected in several orders in this case from the United States Court of Appeals, *supra*, these facts were brought to the attention of the Court of Appeals in the instance of each defendant and resulted in the aforementioned orders.

6. The defendant Harrison is now represented in this Court by Jacob N. Halper, Esq.; the defendant White by Ross O'Donoghue, Esq.; the defendant Sampson by Daniel M. Singer, Esq., pursuant to appointment by former Chief Judge Pine on July 31, 1961.

It is noted that by the aforesaid orders of the Court of Appeals, *supra*, and pursuant to Rule 39a of the Fed-

eral Rules of Criminal Procedure, this Court has jurisdiction to consider, at the direction from the Court of Appeals, a motion by each defendant to vacate and set aside judgment and to award a new trial provided such a motion was filed on or before July 31, 1961. Pursuant to this order, each counsel for the three defendants filed an appropriate motion. The United States Attorney for the District of Columbia, in response to said motions to set aside judgment and to award a new trial, filed a statement of facts relative to said motions as to each defendant on or about August 4, 1961, wherein the government indicated to the Court that should the defendants White and Sampson affirmatively request, in accordance with the order of the Court of Appeals, that this Court vacate and set aside judgment and award a new trial, it was the government's position that it would interpose no objection to such a motion. With respect to defendant Harrison, the government initially filed such a statement, and subsequently filed a supplemental statement of facts relative to the motion to vacate and set aside judgment and grant a new trial as to the defendant Harrison alone. This supplemental statement was filed on September 12, 1961, wherein it was the position of the government that the Court should deny such a motion on behalf of the defendant Harrison as he was represented by competent and approved counsel, Mr. Perry W. Howard, throughout all proceedings of the trial including the filing of a motion for arrest of judgment and a new trial.

7. This matter came on for hearing before this Court on behalf of each defendant on September 14, 1961, at which time counsel for all three defendants indicated that they were appointed to represent their individual defendants on the last day wherein such a motion, as contemplated by the order of the Court of Appeals, could be filed and each counsel filed such a motion in order to protect the interest of his individual defendant without consultation with his defendant. However, each counsel then stated that subsequently he had had the opportunity to confer with his defendant and that each defendant informed his counsel that he specifically did not and would not move the Court, orally or in writing, to vacate and

set aside judgment and award a new trial but that should this be the decision of the Court, each defendant would accept it.

8. On oral argument, with respect to the position indicated by each defendant relative to a motion to vacate and set aside judgment and award a new trial, the government opposed such a motion on the ground that the order of the Court of Appeals specifically limited this Court to consider such a motion when filed by a defendant and that should this be done without his consent, as indicated by each counsel for his individual defendant, a substantial issue of former jeopardy would be raised at the second trial.

### CONCLUSIONS OF LAW

1. This Court has before it for consideration an order of the Court of Appeals for the District of Columbia Circuit, as to each of the three defendants, which was filed on July 21, 1961, in the United States Court of Appeals for the District of Columbia Circuit, ordering that this Court entertain a motion by the defendant in each instance to vacate and set aside judgment and to award a new trial provided such a motion is filed on or before July 31, 1961.

2. That the supervision and control of the proceedings on appeal as to each defendant in Criminal Case No. 635-60 resides with the Court of Appeals for the District of Columbia Circuit pursuant to Rule 39a of the Federal Rules of Criminal Procedure, and that this Court has jurisdiction to consider any matters arising therein solely in accordance with the order or directions to the District Court with regard to a specific motion as outlined in said order.

3. That the motions heretofore filed by counsel for each defendant were done without the consent and not in accordance with the wishes of each defendant, as indicated in Court on September 14, 1961.

4. That the motions heretofore filed by counsel for each defendant must be treated by this Court as withdrawn.

5. That there is not now pending before this Court, and that there will not be submitted to this Court, any

motion on behalf of the defendants herein to vacate and set aside judgment and to award a new trial, within the terms of the order of the United States Court of Appeals dated July 21, 1961.

6. That the purpose of the order of the Court of Appeals referred to above cannot further be carried out in the face of the unwillingness of the defendants herein to file the motions contemplated by that order, and that the case should be resubmitted to the United States Court of Appeals for further proceedings.

Wherefore, it is this 4th day of October, 1961,

ORDERED that each motion filed on behalf of each individual defendant is hereby considered as withdrawn and there being no valid motions before this Court, no order may be made by this Court relative to the merits, if any, of a motion to vacate and set aside judgment and award a new trial.

/s/ Burnita Shelton Matthews  
Judge

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Crim. No. 365-60

UNITED STATES OF AMERICA

v.

EDDIE M. HARRISON

JUDGMENT AND COMMITMENT (REV. 7-52)—

Filed June 18, 1963

On this 14th day of June, 1963 came the attorney for the government and the defendant appeared in person and <sup>1</sup> by his attorney, George J. Thomas, Esquire

IT IS ADJUDGED that the defendant has been convicted upon his plea of <sup>2</sup> not guilty and a verdict of guilty of the offense of

FIRST DEGREE MURDER

as charged <sup>3</sup>

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of <sup>4</sup> the term of his natural life.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United

States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Alexander Holtzoff  
United States District Judge

-----  
Clerk.

The Court recommends commitment to:<sup>6</sup> a Federal institution of the maximum security type.

<sup>1</sup> Insert "by counsel" or "without counsel"; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

<sup>2</sup> Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

<sup>3</sup> Insert "in count(s) number" " if required.

<sup>4</sup> Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

<sup>5</sup> Enter any order with respect to suspension and probation.

<sup>6</sup> For use of Court wishing to recommend a particular institution.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17991

EDDIE M. HARRISON, APPELLANT .

v.

UNITED STATES OF AMERICA, APPELLEE

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No. 17992

ORSON G. WHITE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

---

No. 17993

JOSEPH R. SAMPSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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Appeals from the United States District Court  
for the District of Columbia

(Opinions released December 7, 1965, coincident  
with opinion on rehearing en banc.)

*Mr. Alfred V. J. Prather*, with whom *Mr. George J. Thomas* (both appointed by this court) was on the brief, for appellant in No. 17991. *Messrs. Charles A. Miller* and *Thomas B. Donovan* were also on the brief for appellant in No. 17991.

*Mr. Thomas H. Wall*, with whom *Mr. Ronald N. Cobert* (both appointed by this court) was on the brief, for appellant in No. 17992.

Mr. Monroe Oppenheimer (appointed by this court) with whom Mr. I. William Stempel was on the brief, for appellant in No. 17993.

Mr. William H. Willcox, Assistant United States Attorney, with whom Messrs. David C. Acheson, United States Attorney at the time the brief was filed, and Frank Q. Nebeker and Frederick G. Smithson, Assistant United States Attorney, were on the brief, for appellee. Mr. B. Michael Rauh, Assistant United States Attorney at the time the record was filed, also entered an appearance for appellee in No. 17991.

After the opinions of the judges in the sitting division had been considered, the court *sua sponte* ordered rehearing en banc as to one issue, as hereinafter appears.

PER CURIAM: These appeals from judgments of conviction in the District Court came on to be heard before a division of the court consisting of Senior Circuit Judge Wilbur K. Miller and Circuit Judges Washington and Danaher. The opinions of the respective members of that division require reversal of the convictions, and the order of this court in that result is unanimous.

The issue discussed in part III, C of Judge Danaher's opinion, was made the subject of a rehearing en banc. On June 1, 1965, the court entered the following order with respect to *Harrison v. United States*, No. 17991:

#### ORDER

It is ORDERED *sua sponte* by the court *en banc* that the above-entitled case shall be reheard by the court *en banc* on Tuesday, June 15, 1965. The rehearing shall be limited to the issue of the admissibility of the oral admissions of Harrison made at the District of Columbia Jail on March 21, 1960. Cf. *Harling v. United States*, 111 U.S. App. D.C. 174, 295 F.2d 161 (en banc; 1961).

Per Curiam

Dated: June 1, 1965

Although a majority of the sitting division would have considered that Harrison's oral statements as mentioned in the order might have been received in evidence at a new trial, a majority of the court en banc has ruled otherwise as more fully appears in the opinions that follow.

The convictions are reversed.

*So ordered.*

Dated: December 7, 1965

The opinions of the judges of the original division follow.

Before WILBUR K. MILLER, *Senior Circuit Judge*, and WASHINGTON\* and DANAHER, *Circuit Judges*.

DANAHER, *Circuit Judge*: An indictment filed April 19, 1960 charged the appellants with murder in the first degree, the first count alleging premeditated murder, and the second charging that on or about March 8, 1960, they murdered one George H. Brown "by means of shooting him with a shotgun, while attempting to perpetrate the crime of robbery." The first count was dismissed. The jury on May 8, 1963 found all three appellants guilty of "felony-murder" and recommended life imprisonment for each.<sup>1</sup>

About 9 A.M. on March 8, 1960, the victim Brown, a gambler, answered a knock at the front door of his house at 1713 Fourth Street, N. W., here in the District. He was met by a blast from a sawed-off shotgun which Harrison had concealed under his trench coat. The gunshot minutely fractured Brown's face on the right side, destroyed the right eyeball and macerated his brain.

\* Circuit Judge Washington became Senior Circuit Judge on November 10, 1965.

<sup>1</sup>The sentence was authorized by D. C. CODE § 22-2404 (Supp. IV; 1965). As to background re the amendment, see *Jones v. United States*, 117 U.S.App.D.C. 169, 327 F.2d 867 (*en banc*, 1963); *Coleman v. United States*, 118 U.S.App.D.C. 168, 334 F.2d 558 (*en banc*, 1964).

Brown's body fell against the front door.<sup>2</sup> White and Harrison who had gone to Brown's house intending to rob him, thereupon turned and ran to a waiting get-away car driven by Sampson. The three men then escaped. Additional facts will be interpolated as we turn to the grounds upon which appellate relief is sought.

# I

The appellants were first convicted on October 19, 1960, and on April 21, 1961 had been sentenced to death by electrocution while represented by an impostor, one Daniel Jackson Oliver Wendel Holmes Morgan.<sup>3</sup> The appellants now assert that they were twice placed in jeopardy since this court, *sua sponte*, and over objections by the appellants had ordered a second trial. We do not agree, for in legal effect the so-called "first" trial was a nullity, as will be realized from our noting the bizarre circumstances which impelled our order.

Morgan was not an attorney, but an ex-convict who had taken the name of an absentee attorney, L. A. Harris, who was in fact a member of the bar. Morgan, alias Harris, had purported to represent White and Sampson throughout the first "trial" in September and October, 1960. Harrison then was represented by an attorney who later died whereupon Morgan undertook also to represent Harrison. After the judgment of conviction and sentence, an appeal for all three accused had been brought to this court. While that "appeal" was pending, the Morgan masquerade, was discovered. When informed of such facts, and completely satisfied that the appellants had been denied their right to the effective assistance of counsel, we remanded the case to the District Court that it might entertain a motion for a new trial.

<sup>2</sup> Police who shortly responded discovered that the front door had become locked, with the body of the "huge" Brown against the door. A large "roll" of money was on his person.

<sup>3</sup> Morgan was later convicted of various offenses more particularly enumerated in our opinion affirming his conviction, *Morgan v. United States*, 114 U.S.App.D.C. 13, 309, F.2d 234 (1962), *cert. denied*, 373 U.S. 917 (1963).

But new counsel then representing the appellants refused to move for a new trial, undoubtedly on the assumption that a double jeopardy plea might survive the procedural impasse. This court thereupon declined to further any such stratagem; we directed that the judgments of conviction be vacated. We had concluded under all the circumstances that there was a manifest necessity for our action lest the ends of public justice be defeated.<sup>4</sup> Surely these accused in a capital case were entitled to a "full defense by counsel learned in the law,"<sup>5</sup> rather than to representation by Morgan. Granting that "each case must turn on its facts,"<sup>6</sup> we found the reasons here "compelling"<sup>7</sup> for the action we directed.

The Government then went forward with the trial leading to the convictions now under review. The plea of former jeopardy must fail.

## II

Appellants contend they were denied their right to a speedy trial. Following their first appeal, they could have been tried in the Fall of 1961 if they had followed this court's original suggestion that they move for a new trial. They refused to do so, and as noted, *supra*, this court, *sua sponte*, was obliged to reinstate the appeals and, on June 12, 1962, to enter an order vacating the original judgments of conviction. That order was filed in the District Court July 3, 1962. The District Court then assigned the case for trial on October 17, 1962. By that date there had been hearings on motions of various court-appointed counsel for leave to withdraw; Harrison had no attorney; Attorney David, appointed October 30, 1962, thereafter sought a continuance contending that he had no transcript of the first trial; Harrison then moved

<sup>4</sup> United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); cf. Scott v. United States, 91 U.S.App.D.C. 232, 202 F.2d 354, cert. denied, 344 U.S. 879 (1952) and cases cited.

<sup>5</sup> 18 U.S.C. § 3005 (1958).

<sup>6</sup> Downum v. United States, 372 U.S. 734, 737 (1963).

<sup>7</sup> Gori v. United States, 367 U.S. 364, 368 (1961).

that Attorney David be discharged; motions to dismiss on double jeopardy grounds had been filed and argued; in short, on one basis or other, the District Court was occupied with a series of defense motions, some purportedly of substance, some procedural, but all contributing to delay.

The unique problems stemming in the first place from Sampson's and White's having engaged the impostor Morgan gave rise to the several dilatory moves. No prejudice in fact was shown. Nor were the "circumstances" such as to deprive the appellants of constitutional rights.<sup>8</sup>

### III

Our next inquiry involves inculpatory statements attributed to the respective appellants. We may first set forth briefly the evidence at hand as of the day of the crime.

Across from Brown's house on March 8, 1960 lived a Mrs. McCoy. Between 9 and 9:30 A.M., she heard "this loud noise go off" and ran into the street. She saw "two boys coming out" of Brown's house, and one of them "put something under his coat, a gun."

One Thomas Young had breakfast that morning at Keys' Restaurant. He sat in a booth with Brown until both left the restaurant about 9 o'clock. Then Brown entered his car. In the restaurant Young had seen a man<sup>9</sup> who was looking at him and Brown. He noticed that the man came from the restaurant as Young and Brown left the premises. He saw that man get into a black Buick car parked near the restaurant. Two other people were in the car. Within a short time Young learned of the attack upon Brown and called the police.

Such was the scanty evidence known to the police shortly after their gaining access to Brown's house and their discovery of his body wedged against the front door. Police investigation went forward immediately.

<sup>8</sup> Smith v. United States, 118 U.S.App D.C. 38, 331 F.2d 784 (*en banc*, 1964), and cases therein considered.

<sup>9</sup> Later to be identified as Sampson.

Later that same day officers questioned these appellants concerning their possible connection with the crime. As the police sought information from Harrison, he told an officer his name and his address, and then added "I don't have to tell you anything else, you can go to hell." All three appellants then denied knowledge of the killing. After having been detained overnight, all three appellants were released.

A.

Some time in the afternoon of March 20, 1960, police went to Sampson's house looking for him but he was not there. About 6 P.M., Sampson telephoned to Headquarters and stated to Captain Daly that he understood the police had been looking for him and that he was then at home. Two officers were sent for him. They handcuffed Sampson and brought him to Headquarters. Questioned by Captain Daly, Sampson, commencing about 6 P.M., supplied answers which implicated White and Harrison but which likewise tended to exculpate himself. While Captain Daly was typing up a report of what Sampson had said, White was brought in and was told what Sampson had first said.

White replied "If that is what Sampson said, it is not true, you better talk to him some more." Throughout the evening of March 20, 1960 the questioning of White and Sampson proceeded until, commencing at about 10:30 P.M., Sampson orally submitted an amended version of the part he had played in the crime. Typing of his inculpatory statement commenced around 10:45 P.M. and was completed shortly before midnight. Sampson ultimately was booked at 1:30 A.M. on March 21, 1960. Asked if it was his "purpose in questioning Sampson" to obtain admissions relating to the crime, Captain Daly answered "Yes."

In like manner White at about 10:30 P.M. commenced a statement, the typing of which was completed by Detective Pixton around 11:45 P.M. Thereafter White accompanied the officers to premises at 1511 Newton Street, N. E. as police sought to locate the shotgun which White stated had been put down an incinerator. The gun was

not found, for the incinerator had been cleaned out before police reached the spot. White was booked at about 1:29 A.M. on the morning of March 21, 1960.

Not until later in the forenoon of March 21, 1960 were White and Sampson brought before the United States Commissioner.

At the trial the confessions by Sampson and White were received in evidence. The rule laid down in *Mallory v. United States*<sup>10</sup> has been deemed in some situations not to require exclusion of a voluntary confession forthcoming in the course of an essential investigation.<sup>11</sup> Had Sampson's presence and participation been voluntary, "it is well established that the *Mallory* rule is inapplicable."<sup>12</sup> But in light of various rulings which derived from the particular circumstances of yet other cases, the Government in this court conceded on brief that Sampson's confession should not have been received because of "the length of the interrogation that preceded the incriminating statements." We think because of the record here presented the same is true of White's confession. Under control of the police throughout the evening of March 20, 1960, he had been detained at Headquarters while being questioned; he was then after confessing taken out to where the gun had been disposed of, and was not finally booked until about 1:29 A.M. on the 21st. We think the situation as to White is clearly analogous to that disclosed in *Seals v. United States*,<sup>13</sup> and hence his confession also should have been excluded.

## B.

Additionally, the Government offered in evidence statements taken from Sampson and White by jail classifica-

<sup>10</sup> 354 U.S. 449 (1957):

<sup>11</sup> See, e.g., *United States v. Vita*, 294 F.2d 524 (2 Cir. 1961), *cert. denied*, 369 U.S. 823 (1962); and *Scarbeck v. United States*, 115 U.S.App.D.C. 135, 152, 317 F.2d 546, 563 (1962), *cert. denied*, 374 U.S. 856 (1963), and cases there cited.

<sup>12</sup> *Scarbeck v. United States*, *supra* note 11.

<sup>13</sup> 117 U.S.App.D.C. 79, 81-82, 325 F.2d 1006, 1008-1009 (1963), *cert. denied*, 376 U.S. 964 (1964); cf. *Naples v. United States*, 113 U.S.App.D.C. 281, 284, 307 F.2d 618, 621 (*en banc*, 1962).

tion officers. At one time this court had thought that such statements might be received in evidence.<sup>14</sup> But a division of this court (one judge dissenting) has latterly held otherwise in *Killough v. United States*.<sup>15</sup> We deem ourselves bound to follow that ruling.<sup>16</sup>

It follows that the convictions of Sampson and White must be reversed on the ground that their confessions to the police and their statements to the jail classification officers should not have been received in evidence.

### C.

A different situation is presented with respect to Harrison's oral admissions at the jail and his later written confession. He was not present at Headquarters when Sampson and White confessed. He was already in jail on March 21, 1960 under circumstances we may next describe. On March 19, 1960, one Edith E. Penn swore to a complaint in the Court of General Sessions where she charged Harrison with breaking and entering her apartment on March 18, 1960 and with the theft of \$32 and various articles of personal property. Harrison waived hearing, and bail was fixed at \$5,000. He was committed to jail to await grand jury action and was later indicted in Criminal No. 364-60. Also on March 19, 1960, Harrison had been convicted and sentenced to jail on three traffic charges growing out of violations on March 18, 1960. He had become 18 years of age on March 18, 1960 so that in neither of the foregoing cases had he been charged in the Juvenile Court, nor had he been charged with the Brown homicide in any court. Thus his incarceration on March 19, 1960 and over the subsequent period so far as is here relevant, was in no way related to the crimes involved in the instant case.

<sup>14</sup> *Tyler v. United States*, 90 U.S.App.D.C. 2, 9, 193 F.2d 24, 31 (1951), cert. denied, 343 U.S. 908 (1952).

<sup>15</sup> 119 U.S.App.D.C. 10, 336 F.2d 929 (1964).

<sup>16</sup> Harrison's statement to a jail classification officer is likewise inadmissible, but the circumstances as to Harrison, generally, will be the subject of separate reference, *infra*, part III, C.

The record shows that about 7:30 A.M. on March 21, 1960, Captain Daly and two detectives brought Sampson and White to the jail. They filled out a visitor's request form seeking Harrison's consent to an interview and he agreed. Harrison then was brought by a jail attendant to the rotunda where the police told Harrison that Sampson and White had been charged with the murder of Brown, that they had told the complete story to the officers and had implicated him. Harrison asked: "Well, what did they tell you?"

Thereupon, addressing Harrison, Sampson told Harrison what *he* had said to the police. Likewise, White told Harrison what had been said in *his* statement and the part "that he said Harrison had played." Harrison then stated that what Sampson and White had said was true; "that he had fired the gun through the window; at the time he fired it White was standing on the steps behind him."

The officer then asked Harrison "if he wanted to make a complete statement as to the part he did play in this robbery and homicide and he said yes, that he would." Thereupon, Harrison narrated the development of the plan to rob Brown, the steps taken to effectuate that plan, and his arrangement to borrow a car. He told of his carrying a sawed-off shotgun under his coat, and of other particulars involved in his shooting of Brown. He claimed that as Brown had slammed the door in his face, the glass on the door had hit the shotgun which was thus discharged.<sup>17</sup> We need not supply other details. Harrison's oral admissions were properly received against him.

In the first place, there has been shown no fact of record even tending to establish that Harrison's admissions were not freely and voluntarily forthcoming. The

<sup>17</sup> The Government did not contend that the actual discharge of the shotgun was other than accidental but argued, correctly, that even so, that fact was immaterial since the shooting occurred during the perpetration of a felony. *Coleman v. United States*, 111 U.S.App.D.C. 210, 214, 295 F.2d 555, 559 (*en banc*, 1961), *cert. denied*, 369 U.S. 813 (1962); cf. *Wheeler v. United States*, 82 U.S.App.D.C. 363, 165 F.2d 225 (1947), *cert. denied*, 333 U.S. 829 (1948).

*Mallory* rule which requires the exclusion of Sampson's confession and White's confession from being used in criminal proceedings against them is no bar to their telling Harrison what they had told the police. Here was no set of admissions by Harrison induced by police misrepresentation or fraud.<sup>18</sup> With a jail attendant present at all times, with no coercive questioning by police, with no suggestion of police duress, Harrison knew that the co-accused to his face had told the truth, and thus he offered his version of the crime. From other evidence in the case it is clear that Harrison definitely had on his mind the shooting aspect as distinguished from other phases. He told one Valentine that he had shot "Cider" Brown. He had told one Stevenson that he had gone to Brown's house to pawn the gun and that "the man slammed the door on the gun and the gun went off." As Professor Wigmore observed:

"The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction. At that moment, he will tell all, and tell it truly."<sup>19</sup>

In *Smith v. United States*,<sup>20</sup> this court held that the testimony of one Holman, an eyewitness to the crime, might be received in evidence against Smith even though Holman's identity had been learned during the illegal detention of Smith, as its source. We are satisfied that there was no error in receiving in evidence Harrison's oral admissions given in the presence of Sampson and

<sup>18</sup> Cf. *Hawkins v. United States*, 81 U.S.App.D.C. 376, 158 F.2d 652 (1946), *cert. denied*, 331 U.S. 830 (1947). There police had informed the appellant that his relatives were being questioned.

<sup>19</sup> 3 WIGMORE, EVIDENCE § 851, at 319 (3d ed. 1940).

<sup>20</sup> 117 U.S.App.D.C. 1, 324 F.2d 879 (1963), *cert. denied*, 377 U.S. 954 (1964); and see *Williams v. United States*, 272 F.2d 822 (6 Cir. 1959), *cert. denied*, 364 U.S. 836 (1960); cf. *Payne v. United States*, 111 U.S.App.D.C. 94, 294 F.2d 723, *cert. denied*, 368 U.S. 883 (1961).

White, quite irrespective of the status of their own confessions.

Harrison additionally contends that his oral admissions at the jail were excludable because of our holding in *Harling v. United States*.<sup>21</sup> There we were concerned with the admissibility of damaging oral statements made by Harling while in police custody when he was seventeen years old and before the Juvenile Court had waived jurisdiction. He had admitted participation in the robbery after which he was returned to the Receiving Home to await hearing before the Juvenile Court. We observed that under the applicable statutes impairment of the *parens patriae* function must be avoided. This requires that admissions by a juvenile in connection with the non-criminal proceeding be excluded from evidence in the criminal proceeding."<sup>22</sup> We later explained that

"The *Harling* case bars the Government from using against an accused in a criminal trial a confession or admission *officially obtained from him when he was a juvenile detained under the auspices of the Juvenile Court*, where the latter court has subsequently waived its jurisdiction and transferred the accused for trial to the District Court."<sup>23</sup> (Emphasis supplied.)

The "special practices" applicable to a juvenile underlay the *Harling* ruling, we observed, and evidence "directly or indirectly obtained through juvenile procedures"<sup>24</sup> became subject to exclusion, depending upon whether the procurement of that evidence was "sufficiently divorced from the juvenile procedures . . . ." <sup>25</sup>

<sup>21</sup> 111 U.S.App.D.C. 174, 295 F.2d 161 (*en banc*, 1961).

<sup>22</sup> *Id.* at 177, 295 F.2d at 164. The Juvenile Court then was deemed to have original and exclusive jurisdiction of all cases and proceedings concerning a person under 21 years of age "*charged with having violated any law*" (emphasis supplied) prior to having become 18 years of age. D. C. CODE § 11-907 (1961).

<sup>23</sup> *Edward v. United States*, 117 U.S.App.D.C. 383, 384, 330 F.2d 849, 850 (1964).

<sup>24</sup> *Id.* at 385, 330 F.2d at 851.

<sup>25</sup> *Ibid.*

None of the considerations so outlined can here be discerned.<sup>26</sup> Harrison's statements were not elicited by virtue of the authority of the Juvenile Court or of any of its functionaries. Unlike Harling, Harrison had not in the language of the Code, been "charged with having violated" any law applicable to the Brown homicide, in the Juvenile Court or in any other court. Thus he was not disabled from talking as was Harling. Appellant's present contention carried to its logical end would have us say that if Harrison had been twenty years and eleven months of age when apprehended, his completely voluntary admissions must be excluded simply because they related to a crime committed when he was only ten days short of his eighteenth birthday. Our *Harling* decision requires no such absurd result, for neither its rationale nor the circumstances there considered can have application here.

Rather, confronted by his confederates in crime, he spontaneously submitted his own version of the affair. He even sought to exculpate himself to the extent possible and to ascribe the homicide to an accidental cause. Only after he had offered his explanation were the police in position to charge Harrison with the Brown offense. So it was that later on, in the afternoon of March 21, 1960, the homicide complaint was lodged against Harrison. The *Harling* case has no applicability to the issue before us, as the *Edwards* case makes clear, and the trial judge did not err in refusing to exclude Harrison's oral statements at the jail on the morning of March 21, 1960.

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<sup>26</sup> Here the court was not dealing with a "child." This man had become 18 years of age on March 18, 1960. He had gone through 11 grades in school. He was a completely wary adult who knew exactly what he was doing. He had told the officers following his arrest on March 8, 1960 that the only information he had to give them was his name and address and that he did not have to tell them anything else; "You can go to hell," he said. Even when confronted by Sampson and White he asked the officers "Well, what did they tell you?" Having heard from them personally, he went forward with his own version of the episode.

## D.

A different position must be taken with reference to Harrison's written confession. Some hours after Harrison's early morning statements in the presence of Sampson and White, officers returned to the jail without the co-accused. The police then went back over the substance of Harrison's earlier interview and reduced his statements to writing. His confession so taken should have been excluded.<sup>27</sup> Harrison had not been presented before the Commissioner although he readily could have been on the basis of his earlier admissions.

Moreover, as had been the case with respect to Sampson and White, the Government introduced Harrison's statement to a jail classification officer. That statement likewise was erroneously received.<sup>28</sup>

## IV

Other contentions pressed upon us have been fully considered but we deem them so lacking in substance that further discussion is not required. From what has been said it is clear that the convictions of all three appellants must be

*Reversed.*

WILBUR K. MILLER, *Senior Circuit Judge*, concurring: I join in Parts I and II of Judge Danaher's opinion and in his treatment of the *Harling* point urged on behalf of the appellant Harrison. There is room for doubt, I think, whether the confessions to the police at headquarters should have been excluded on *Mallory* grounds; but there is no doubt that under the holding of the second *Killough*

<sup>27</sup> Cf. *Killough v. United States*, 114 U.S.App.D.C. 305, 315 F.2d 241 (*en banc*, 1962).

<sup>28</sup> *Killough v. United States*, *supra* note 15 and corresponding text, and see note 16 *supra*.

case,<sup>1</sup> the appellants' statements to the jail classification officers should not have been received in evidence.

I think it is a travesty on justice to reverse the convictions of these three murderers. Reversal is required, however, by the second *Killough* case which is controlling authority although it is, in my view, grossly wrong. So, I very reluctantly concur in the ultimate result.

WASHINGTON, *Senior Circuit Judge*: I concur in the result. I would add that in my view Harrison's confessions are barred by our decision in *Harling v. United States*, 111 U.S.App.D.C. 174, 295 F.2d 161 (en banc, 1961). Harrison was 17 years old when the present offense was committed, and 18 at the time of his interrogation at the jail. He was under the exclusive jurisdiction of the Juvenile Court with respect to that offense. See D.C.CODE § 11-907(1)(b) (1961).<sup>1</sup> Waiver of jurisdiction by the Juvenile Court occurred later. But at the time of the interrogation he was subject to the rule in *Harling*, and his confession was barred by that rule.

<sup>1</sup> *Killough v. United States*, 119 U.S. App. D.C. 10, 336 F. (2d) 929 (1964), decided by Judges Washington and Wright, with Judge Danaher dissenting.

<sup>1</sup> "§ 11-907. Jurisdiction—Original and exclusive.

"1. *Children*.—Except as herein otherwise provided, the [Juvenile] court shall have original and exclusive jurisdiction of all cases and in proceedings:

\* \* \*

"(b) Concerning any person under 21 years of age charged with having violated any law, or violated any ordinance or regulation of the District of Columbia, prior to having become 18 years of age, subject to appropriate statutes of limitation."

ON REHEARING EN BANC

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17991

EDDIE M. HARRISON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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Appeal from the United States District Court  
for the District of Columbia

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Decided December 7, 1965

*Mr. Alfred V. J. Prather*, with whom *Messrs. George J. Thomas* (both appointed by this court), *Charles A. Miller* and *Thomas B. Donovan*, were on the brief, for appellant.

*Mr. Frank Q. Nebeker*, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, *Frederick G. Smithson* and *William H. Willcox*, Assistant United States Attorneys at the time the brief was filed, were on the brief, for appellee. *Mr. B. Michael Rauh*, Assistant United States Attorney at the time the record was filed, also entered an appearance for appellee.

Before *BAZELON*, Chief Judge, *WILBUR K. MILLER*, Senior Circuit Judge,\* and *FAHY*, *WASHINGTON*,\*\* *DANAHER*, *BURGER*, *WRIGHT*, *MCGOWAN*, *TAMM*, AND *LEVENTHAL*, Circuit Judges.

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\* Sitting by authority of 28 U.S.C. § 46, as amended Nov. 13, 1963.

\*\* Circuit Judge Washington became Senior Circuit Judge on November 10, 1965.

LEVENTHAL, *Circuit Judge*, with whom *Chief Judge* BAZELON and *Circuit Judges* FAHY, WRIGHT and MCGOWAN join: This court en banc, on its own motion, ordered rehearing limited to the issue of the admissibility of Harrison's oral admissions made March 21, 1960. Those admissions, made a few days after he turned eighteen, related to a criminal offense committed prior to his eighteenth birthday. The Juvenile Court Act expressly gives the Juvenile Court original and exclusive jurisdiction over all cases and proceedings involving persons under twenty-one years of age charged with having violated a law prior to having become eighteen years of age.<sup>1</sup> It was not until a week after his confession that the Juvenile Court exercised its statutory authority to waive jurisdiction over the offense. Under the governing rule laid down by this court, en banc, in *Harling v. United States*, 111 U.S. App. D.C. 174, 295 F.2d 161 (1961), the admissions made March 21

<sup>1</sup> For the pertinent provisions in effect in 1960, see Title 11, D.C. Code (1961):

§ 11-907. *Jurisdiction—Original and exclusive.*

1. *Children.*—Except as herein otherwise provided, the court shall have original and exclusive jurisdiction of all cases and in proceedings:

\* \* \* \*

(b) Concerning any person under 21 years of age charged with having violated any law, or violated any ordinance or regulation of the District of Columbia, prior to having become 18 years of age . . . .

§ 11-914. *Waiver of jurisdiction in case of felony—Transfer of case.*

If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this subchapter in conducting and disposing of such cases.

Following Public Law 88-241, Dec. 23, 1963, these provisions were transferred to §§ 1551 and 1553 of Title 11, D.C. Code. The changes made are not material to any point under discussion.

may not be received in evidence in the criminal proceeding in District Court.

The trial court considered this to be a close question, but admitted the confession on the ground that "the *Harling* case should be confined to its strict facts."<sup>2</sup> This was error. *Harling* establishes the broad principle that statements elicited from a minor in police custody at a time when he is subject to the original and exclusive jurisdiction of the Juvenile Court are not admissible against him in the event of a subsequent waiver of that jurisdiction and criminal trial in the District Court. *Harling* puts to one side, as do we, the case of spontaneous statements. What are involved here are statements secured by police questioning and confrontation.

The foundation stone of *Harling* is the opinion of Judge Prettyman in *Pee v. United States*, 107 U.S. App. D.C. 47, 274 F.2d 556 (1959), which stressed the non-criminal philosophy of the Juvenile Court Act.<sup>3</sup> Unfolding the consequences we pointed out in *Harling*:<sup>4</sup>

*Pee* makes plain that from the moment a child commits an offense, "in effect he is exempt from the criminal law" unless and until the Juvenile Court waives its jurisdiction. During that period the juvenile rules govern; they allow detention for five days without a judicial hearing . . . .

<sup>2</sup> The trial court also noted that admission of the confession gave defendant a right of review, while excluding the confession would leave the government without recourse for miscarriage of justice. It would be indefensible to transmute the defendant's right of appeal into an extra burden on close questions arising during trial. However, in this case the trial court made it clear that it was his opinion that the *Harling* objection, while a close question, and worthy of consideration, should be overruled.

<sup>3</sup> See 107 U.S.App.D.C. at 49, 274 F.2d at 558:

In the event a child commits an offense against the law, the state assumes a position as *parens patriae*, and cares for the child. Such a one is not accused of a crime, not tried for a crime, not convicted of a crime, not deemed to be a criminal, not punished as a criminal, and no public record is made of his alleged offense. In effect he is exempt from the criminal law.

<sup>4</sup> 111 U.S. App.D.C. at 176-77, 295 F.2d at 163-64.

It is, of course, because children are, generally speaking, exempt from criminal penalties that safeguards of the criminal law, such as Rule 5 and the exclusionary *Mallory* rule, have no general application in juvenile proceedings. . . .

. . . . These strict safeguards [i.e. "procedural safeguards observed in criminal proceedings"], however, are wholly inappropriate for the flexible and informal procedures of the Juvenile Court, which are essential to its *parens patriae* function. To avoid impairment of this function, the juvenile proceeding must be insulated from the adult proceeding. This requires that admissions by a juvenile in connection with the non-criminal proceeding be excluded from evidence in the criminal proceeding.

The *Harling* opinion makes clear that the exclusion of admissions "in connection with the non-criminal proceeding" applies not only to statements made to Juvenile Court judges or attachés, but to all statements made at a time when he is subject to the exclusive jurisdiction of the Juvenile Court. The fact that Harling made his statement in the police station was not a reason for limiting the exclusionary rule. On the contrary, we expressly noted that "the problem is accentuated in cases, such as this one, where the admissions are extra-judicial, entirely unenviored by any court protections." And we specifically rejected a solution which would make admissibility vary from case to case depending on a probing in each case of the capacity of the minor to understand and waive his rights.

Only a minority of jurisdictions use a jurisdictional line below the eighteen year level of our Juvenile Court Act.<sup>5</sup>

<sup>5</sup> See Hearings on H. R. 6747 before Subcommittee No. 3 of the Committee on the District of Columbia, House of Representatives, 87th Cong., 1st Sess. 63 (1961).

Congress also used the eighteen year jurisdictional line in the Federal Juvenile Delinquency Act passed in 1938 (see 18 U.S.C. § 5031). That other legislatures were of like mind see e.g. Pa. Laws 1939, Acts Nos. 226, 227 (increasing age limit from sixteen to eighteen).

Proposals to reduce the age limit in the District law have not been approved.<sup>6</sup> The question presented by the teenager accused of serious crime is undoubtedly baffling, and there are no clear answers. Particularly vexing are the problems presented by the sixteen or seventeen year old adolescents precocious in criminal propensity. The problem of which of them should be waived<sup>7</sup> is of such breadth and complexity that the responsibility for the waiver determination was deliberately assigned to the judge of the Juvenile Court and not to the prosecutorial arm of the government.<sup>8</sup> The "full investigation" by the judge, speci-

<sup>6</sup> The Judicial Conference of the District of Columbia Circuit unanimously resolved on November 24, 1959, "that the age limits stated in the Juvenile Court Act should not be lowered." See pp. 1235-36 of *Hearings on Juvenile Delinquency*, before the Subcommittee to Investigate Juvenile Delinquency of the Senate Judiciary Committee, 86th Cong., 1st Sess. (1960).

H.R. 6747, 87th Cong., 1st Sess., proposed lowering the maximum age of juveniles from eighteen to sixteen years. The bill was favorably reported by the Committee on the District of Columbia (H.R. Rep. No. 1041). However, although the bill passed in the House, S.486, containing no provision for lowering the age limits, was passed in lieu thereof by the Senate, agreed to by the House, and approved by the President on March 9, 1962. 108 Cong. Rec. 2945, 3874 (1962).

<sup>7</sup> Compare Commentary by the Committee on the Standard Juvenile Court Act of the National Probation and Parole Association relating to § 13 (Transfers) of the Standard Juvenile Court Act, 5 N.P.P.A.J. 353 (October 1959):

It is true that some sixteen- and seventeen-year-olds, and even some younger, have strongly developed tendencies which render them impervious to the average juvenile or family court's services. Accordingly, it is necessary to authorize transfer to the criminal court. Of course, before such transfer is made the court should have sufficient knowledge of the situation so that discretion can be exercised on the basis of an understanding of the child and his situation.

<sup>8</sup> See e.g. testimony in the 1960 Senate hearings (cited *supra* note 6) by Judge E. Barrett Prettyman who noted that his interest in the Juvenile Court was of long standing: as Corporation Counsel twenty-five years previous he had the supervisory function for presentation of cases to Juvenile Court and he participated in the drafting of the 1938 statute now on the books. It was at his suggestion as Chief Judge of the Court of Appeals that the Judicial Conference

fied in the statute, is not confined to an awareness of the offense at hand, but includes evaluation of the juvenile

of the District of Columbia Circuit appointed a committee, headed by A. Murray Preston, to study the Juvenile Court in a cooperative venture with the Law Enforcement Council of the District of Columbia (Hearings p. 1216).

Asked to comment on the proposal that the authority to waive or retain Juvenile Court jurisdiction be lodged in the United States Attorney, Judge Prettyman stated: "With the greatest deference, but with the maximum vigor with which I am capable, I disagree with it." (Hearings p. 1220). He amplified:

The statistics of our juvenile court indicate that about one-third of juveniles of ages 16 and 17 years who are charged with committing serious violations of law belong in the first class, that is, what might be called hoodlums; about two-thirds are not to be so classified but are children, as to whom chastisement of more or less severity will put an end to their difficulties. The great problem, therefore, is to separate the hoodlums from the others. . . . The great outcries to the effect that juveniles of 16 or 17 years of age, who repeatedly commit serious offenses, particularly of the vicious type, ought to be tried publicly and committed to penal institutions, while attractive as headlines, find no dissent so far as I am aware.

How should this separation be made? Obviously, it seems to me, it should be made by the juvenile authorities; that is, by the staff and the judge of the juvenile court. These are the authorities to whom the charge of violation is first presented; these are the ones who are equipped to evaluate juveniles. They are the ones who have the records which indicate whether a given juvenile is a "repeater" or not. Proposals that this evaluation be made by the U.S. attorney or by the district court are wholly unrealistic, to my way of thinking.

In his testimony Mr. Preston submitted the resolution of the Judicial Conference of the District of Columbia Circuit dated November 24, 1959, referred to above, note 6, which urged that the Juvenile Court be strengthened by the appointment of additional judges, elimination of jury trials (a provision unique in the District of Columbia law), and expansion of facilities for treatment of youthful offenders.

Likewise asked for comment, Mr. Preston also opposed the proposal to transfer waiver authority to the district attorney. He agreed with Chairman Hennings that the prosecutor would be disposed to make his determination on the basis of the offense rather than the individual. (Hearings p. 1237). He stated:

We believe this decision is by its very nature a judicial one. We do not believe the prosecutor should make it. We do not

and his record, made by the judge with the benefit of the contribution of assistants with special background in the social sciences. The "essence of the juvenile court system is . . . the skill and experience of the specialist judge brought to bear upon young people in trouble."<sup>9</sup>

The purpose of the *Harling* doctrine sinks out of sight if the rule is examined only through the instances where it is applied—for those by definition are the exceptional cases, where the Juvenile Court has waived its jurisdiction. *Harling* is a prophylactic rule, to assure Juvenile

believe a social worker should make it. We do not think it should be frozen hard into statutory language. The district court does not have the personnel or the organization to make it. It must be made. . . . Now, as the process of waiver is followed now, the opinion of the representative of the prosecutor's office is available to the juvenile court judge when the question is decided by him as to whether waiver should be made or not, and I think that is exactly the way it should be done. . . .

It is partly a question of prosecutive merit, partly a social problem, partly a question of how old he is, partly a question of what is his record in the past, what is the crime involved. The criteria for that waiver have been very carefully worked out.

\* \* \* \*

We think that the juvenile court judge is the only person and the logical person to make this decision.

The waiver criteria of the Juvenile Court were made public by its Policy Memorandum No. 7, November 30, 1959. See 1960 Hearings, *supra* note 6, at p. 1175-76.

The location of responsibility in the Juvenile Court under the District of Columbia Act is underscored by the fact that in the Federal Juvenile Delinquency Act (*supra* note 5) passed in 1938, Congress placed the separation responsibility in the Attorney General. 18 U.S.C. § 5032. In that situation, of course, there are no federal juvenile courts available with specialized staff and machinery for an immediate investigation of the background of the offender.

<sup>9</sup> *Kent v. United States*, 119 U.S. App. D.C. 378, 343 F.2d 247 (1964), cert. granted, 381 U.S. 902 (1965).

To be eligible for appointment as a judge of the Juvenile Court a person must have "a broad knowledge of social problems and procedure and an understanding of child psychology." 11 D.C. Code § 1502 (1964 Supp.). The word "broad" was inserted by the 1963 amendment.

Court treatment for the cases where it may yield beneficial results to society. The juvenile courts do not fight delinquents, but delinquency. The sorting out of the waiver cases on the younger side of the general line of jurisdiction is the task assigned to the broad gauge of the judge and not to the prosecutor or the police force. The Juvenile Court's broad exclusive original jurisdiction reflects the experience that a delinquent's capacity for rehabilitation can not be conclusively determined by the seriousness of his offense.<sup>10</sup>

The prosecution in effect invites us to consider the particular circumstances of Harrison's confession and to carve an exception to *Harling* that will embrace these circumstances.<sup>11</sup> This suggestion reflects an attitude that is contrary to the statement and policy of *Harling's* broad exclusion of statements, though voluntary, elicited from a minor still within the exclusive jurisdiction of the Juvenile Court. It may be worthy of mention that the prose-

<sup>10</sup> This is the experience gleaned from cases of thousands of delinquents, according to Judge Paul W. Alexander of Toledo, Ohio, a noted authority, as set forth in his article "A Brief Reintroduction to the Juvenile Court," 50 A.B.A.J. 353, 354 (1964).

<sup>11</sup> Defense counsel likewise urges us to consider the particular facts of Harrison's confession, urging, as an alternative argument, that those facts call for an application of *Escobedo v. Illinois*, 378 U.S. 478 (1964). He argues that the absence of counsel at the time of the statement renders it inadmissible, and that it was only the absence of counsel alert to the consequences of the felony murder rule which enabled the police officer to extract a confession by reassuring Harrison that the police appreciated that the killing was only an accident. *Escobedo* likewise denied all knowledge of the crime until confronted by an accomplice, and likewise sought to exculpate himself through a fact which would be considered meaningful by a layman, but lacked sufficiency as a legal defense.

Harrison did not request counsel. There are varying views as to whether an adult offender must request counsel in order to invoke *Escobedo*. Compare *People v. Dorado*, — Cal. 2d —, 398 P.2d 361 (1964), cert. denied, *California v. Dorado*, 381 U.S. 937 (1965); *Russo v. New Jersey*, — F.2d —, 33 LW 2621 (3d Cir. May 20, 1965); with *People v. Gunner*, — N.Y.2d —, — N.E.2d —, March 11, 1965 (N.Y.L.J. July 22, 1965, p.1); *Tracy v. Commonwealth*, 33 LW 2620 (Mass. Sup. Jud. Ct., April 26, 1965).

We do not reach this *Escobedo* question.

cution's presentation to this court bypasses entirely the group police questioning of Harrison at Police Headquarters on March 8, 1960, when he was kept overnight at the Receiving Home.<sup>12</sup> The prosecution would presumably agree that *Harling* would have required exclusion of Harrison's confession if obtained March 8, or 9, due to the exclusive jurisdiction of the Juvenile Court. The *Harling* rule, like the Juvenile Court's jurisdiction and the non-criminal approach which it protects, depends on age at the time of the offense. The Juvenile Court's exclusive jurisdiction of this offense was in no way impaired by the fact that prior to March 21, the date of the admissions, Harrison turned eighteen, became subject to the jurisdiction of the criminal courts as to other offenses, and was committed to jail for traffic violations. The law conceives that society as well as the youths involved will benefit by maintaining the availability of a juvenile de-

<sup>12</sup> Officer Short testified that he arrested Harrison on March 8, 1960. He was accompanied by several other police officers. Harrison was taken to Police Headquarters, where he was questioned concerning the death of Brown in a room assigned to Homicide Squad. Harrison insisted that he knew nothing about it. Short stated there were ten officers present, and beginning to list them he concluded, "I guess, the whole squad were there." He first referred to this session as lasting only three or four minutes, but upon further questioning indicated the questioning may have lasted even longer than fifteen minutes. Efforts by defense counsel to probe the length of this questioning were cut off by the trial court.

Officer Schwab testified that on the afternoon of March 8, 1960, he questioned Harrison in the presence of Detective Coppage (not listed by Officer Short) for about four or five minutes at the Robbery Squad of the Detective Bureau at Police Headquarters; that he advised Harrison "of the seriousness of the offense and his rights"; that he "started questioning him as to what he knew about this case"; that Harrison "told me he did not have to talk to me at all and that I could go to hell"; and that Schwab then "got up and walked away from him."

The sequence of these two questionings is not clear from the record. In any event, Harrison was taken downstairs after the questioning, was put in a big cell for some time, and was then taken to the Receiving Home. He spent the night at the Receiving Home and the following morning, March 9, was taken back to No. 1 Headquarters by the police. The prosecution witnesses stressed his reappearance March 9, because they wanted to establish that his photograph, a Government exhibit, was taken on that date.

linquency approach, sparing those who lacked maturity of judgment when under eighteen, and may not have fully appreciated the consequences of their acts, from the stigma of criminality for the rest of their lives, and encouraging them, with changed environment and under proper supervision, to become law-abiding citizens.<sup>13</sup>

A root problem sidestepped by the prosecution is the unfairness inherent in any use of the confession in a criminal case despite the inability to provide basic conventional criminal safeguards.<sup>14</sup> The prosecution could not promptly take Harrison before a magistrate for a preliminary hearing pursuant to Rule 5. It was a week before the Juvenile Court ruled on waiver. The prosecution would in effect consign Harrison to limbo, with his awkward age making him too young for the protection afforded adults, but too old for the protection of the exclusive Juvenile Court jurisdiction.

We cannot agree that this unjust and anomalous result is compelled by the use of the word "charged" in the Juvenile Court Act, that the Act precludes the application of the *Harling* rule so long as the police elicit the statement from a juvenile under interrogation before the

<sup>13</sup> In view of this policy the Federal Juvenile Delinquency Act has been held applicable to proceedings begun after the eighteenth birthday, even though that statute, unlike ours, does not expressly establish juvenile delinquency jurisdiction in such cases. *United States v. Fotto*, 103 F.Supp. 430, 431 (S.D.N.Y. 1952); *United States v. Webb*, 112 F.Supp. 950, 951 (W.D. Okla. 1953); *United States v. Jones*, 141 F.Supp. 641, 643 (E.D. Va. 1956).

<sup>14</sup> The following trial colloquy is illuminating:

THE COURT: Of course, hindsight is always better than foresight. It might have been better if they had waited until the waiver before they went down and talked to him at the jail.

MR. SMITHSON: Your Honor, I really can't say that, because they knew he was then an adult.

THE COURT: He was what?

MR. SMITHSON: He was over the age of 18.

THE COURT: Let us assume he was an adult. Then he should have been brought before a magistrate, should he not?

MR. SMITHSON: But not for a crime committed while he was a juvenile.

THE COURT: I think this is a very close case.

charge is formally filed in court. In *Harling*, as here, the excluded statement was obtained before the defendant was formally charged in court. Just because an alleged offender is a juvenile, and most vulnerable, does not mean that the police become entitled not only to interrogate without any need to observe Rule 5, which generally requires arrested persons to be brought before a committing magistrate without unnecessary delay, but also to testify fully as to the minor's statements in the event of a criminal trial after waiver. The *Harling* opinion makes clear that the non-criminal Juvenile Court Act approach is exclusive "from the moment a child commits an offense." This view is in accordance with the Congressional instruction that the provisions of the Juvenile Court Act establishing this legislative court "shall be liberally construed" to accomplish the rehabilitative purposes of the law.<sup>15</sup>

<sup>15</sup> 11 D.C. Code § 903 (1961), now consolidated with § 902 and transferred to 16 D.C. Code § 2316 (1964 Supp.).

There are three independent and complete answers to any suggestion that there are "jurisdictional" barriers to this liberal construction directed by Congress:

(1) The Juvenile Court, like other District of Columbia legislative courts, rests on the authority of Congress under Article I (sec. 8, cl. 17) of the Constitution, and is not controlled by the "case or controversy" concept applicable to Article III courts. *Keller v. Potomac Elec. Co.*, 261 U.S. 428, 442-43 (1923); *O'Donoghue v. United States*, 289 U.S. 516, 546 (1933).

(2) If necessary there would be no difficulty in delineating an "anticipatory jurisdiction" in the Juvenile Court overseeing treatment of the juvenile between arrest and formal charge. Compare *Ex parte United States*, 287 U.S. 241 (1932), where the Supreme Court, exercising its authority to issue writs in aid of jurisdiction, 28 U.S.C. § 1651, mandamus a district judge in order to protect an eventual jurisdiction it might never exercise. Though there is no criminal "case or controversy" until a crime is formally charged, even a constitutional district court has an anticipatory equity jurisdiction in advance of indictment to "reach forward" to control or prevent improper preparation of evidence by United States Attorneys, or law enforcement officers, through unconstitutional searches and seizures. See *Smith v. Katzenbach*, — U.S. App. D.C. —, — F.2d —, No. 19230, decided September 3, 1965, slip opinion pp. 8-11, and cases discussed therein. See also Rule 41(e), Federal Rules of Criminal Procedure.

(3) It suffices here to say that a court is discharging an important judicial function when it excludes statements that are

The prosecution argued that the *Harling* rule unduly discourages Juvenile Court waivers. We asked for available judicial statistics which, though not part of the record on appeal, are properly before us in view of our superintendent power over the administration of justice in the local courts.<sup>16</sup> The data indicate that the Juvenile Court properly does not regard the prosecution's reference to a *Harling* problem as barring waiver.<sup>17</sup>

offered in court notwithstanding failure of police to observe the limitations applicable to the taking of such statements prior to the time the court's jurisdiction formally attached. A person is fairly said to be "within" or "under" a court's jurisdictional protection though technically the courts jurisdiction attaches only when a charge is filed in court, and prior thereto he is only "subject to" the invocation of that jurisdiction. Compare Judge Holtzoff in *United States v. White*, 153 F. Supp. 809, 811 (D.D.C. 1957), that a juvenile arrested for an offense is "then under the jurisdiction of the Juvenile Court" and hence Rule 5 is inapplicable.

For a person questioned for acts that would bring him within the original criminal jurisdiction of the district court the limitation on questioning includes the requirement of prompt arraignment, and failure to observe that limitation requires exclusion of the statement. *Mallory v. United States*, 354 U.S. 449 (1957).

For a person questioned for acts that would bring him within the exclusive original jurisdiction of the Juvenile Court, the matter is non-criminal, in the absence of a waiver, and hence is not governed by the rules and limitations established for criminal cases. The implied limitation on such questioning is that statements are deemed taken for use solely before the Juvenile Court.

<sup>16</sup> See *Fisher v. United States*, 328 U.S. 463, 476 (1946); *Griffin v. United States*, 336 U.S. 704, 712-18 (1949); compare *Jones v. United States*, 105 U.S. App. D.C. 326, 328, 266 F.2d 924, 926 (1959).

<sup>17</sup> The Government's data show that between October 1962, and June 1965, the United States Attorney recommended against waiver as to 123 offenders because of the *Harling* exclusionary rule (sometimes accompanied by other problems) and that in 24 instances the Juvenile Court waived the case notwithstanding.

In these 24 cases, there were 4 instances where presentment to the grand jury was declined, 5 cases were ignored by the grand jury, and there were 3 directed verdicts of acquittal and 12 convictions.

Apparently no effort was made to follow the possibility referred to in *Harling*—that the district court retain the waived case but exercise the powers conferred on the Juvenile Court, as expressly

In any event, *Harling* rests on fundamental considerations of fairness and protection of the Juvenile Court approach. It prohibits the admission against Harrison in a new trial of his statement of March 21, 1960.

WASHINGTON, *Senior Circuit Judge*: I concur in the result for the reasons given in my separate concurring opinion in the decision of the original division in this case.

DANAHER, *Circuit Judge*, with whom WILBUR K. MILLER, *Senior Circuit Judge*, and BURGER and TAMM, *Circuit Judges*, join, dissenting: In Part III, C, *supra* of the opinion of a majority of the original sitting division,<sup>1</sup> the facts appear in some detail and will here be mentioned only briefly. The exact chronology is important, however, particularly as it illustrates how in my view the *en banc*

permitted by D.C. Code § 11-914. For an instance where the district court did elect to sit as a juvenile court, see the order of Judge Youngdahl reported in *United States v. Anonymous*, 176 F.Supp. 325 (D.D.C. 1959). District courts generally have jurisdiction of juvenile delinquency proceedings under the Federal Juvenile Delinquency Act. 18 U.S.C. § 5301 et seq.

The impact of *Harling* is a qualitative matter, and little illumination is provided either by the data filed with us or by the published statistical reports of the Juvenile Court. We have examined the latter and note that there are no data relating waivers to referrals for particular offenses. Total figures for the period October 1962—June 1965, show some 235 cases waived out of approximately 2600 referrals subject to waiver determination. These figures are rounded; the number of referrals should be increased if any significant number of the 240 complaints for "damage to property" and "possession of weapons" are ascribable to felony charges. The data include over 900 referrals for unauthorized use; the Juvenile Court's report for 1964 (p. ii) says these overstate the number of offenses since the report lists five referrals for unauthorized use if five boys are found joyriding in a car earlier stolen by one of them.

<sup>1</sup> The three judges who first heard this case decided to reverse the convictions of Harrison and his co-defendants White and Sampson on grounds set forth in the division's opinion, *supra* p. 3. On the point at issue here, Senior Circuit Judge Miller and Circuit Judge Danaher joined in affirming the ruling of the trial judge. Circuit Judge Washington dissented on this score.

majority opinion has inverted the applicable statute<sup>2</sup> and has failed to recognize the narrow holdings of the *Pee*<sup>3</sup> case and the *Harling*<sup>4</sup> opinion.

The result is that my colleagues of the majority will not allow the Government to offer in evidence at a new trial Harrison's own voluntary oral statements that he planned with others to rob "Cider" Brown, arranged for a getaway car, brought along a sawed-off shotgun for use in executing the felony, and then all but literally blew the head off his victim.

My colleagues so decide on the ground that at the time of the murder, the "child" Harrison was only 17 years 11 months and 20 days old. Therefore, they say, he was disabled after he became 18 years of age from voluntarily outlining the several inculpatory steps even though he had not yet been charged with the murder offense and hence was not before the Juvenile Court or any other court on that account.

### I. *The Facts Here Pertinent.*

Brown was murdered on March 8, 1960.

Harrison became 18 years of age on March 18, 1960.

Harrison on March 18, 1960 was arrested and charged with speeding.

Harrison on March 19, 1960 was sentenced to jail on the traffic charges.

Harrison on March 19, 1960 was charged in the Court of General Sessions by one Edith Penn with breaking and entering her apartment and with larceny. Harrison waived hearing and was committed to jail to await grand jury action.

Harrison as of March 19, 1960 had not been charged in the Juvenile Court with any of the foregoing offenses.

<sup>2</sup> D. C. CODE § 11-907 (1961), hereinafter referred to in Part III, *infra*. The pertinent Code sections appear in footnote 1 of the *en banc* majority opinion.

<sup>3</sup> *Pee v. United States*, 107 U.S.App.D.C. 47, 274 F.2d 556 (1959).

<sup>4</sup> *Harling v. United States*, 111 U.S.App.D.C. 174, 295 F.2d 161 (1961).

In the early morning hours of March 21, 1960, White and Sampson signed confessions of their complicity in the "Cider" Brown felony. They implicated Harrison.

About 7:30 A.M. on March 21, 1960, White and Sampson at the jail were brought into confrontation with Harrison. They told Harrison in detail just what they had said to the officer.

Harrison thereupon, on March 21, 1960, during that confrontation, uttered the statements now said by the majority to be inadmissible. Only thus and on that day did the police secure the evidence upon which they later "charged" Harrison.

Harrison on the afternoon of March 21, 1960, for the first time was charged in the Juvenile Court, the police complaint having been based upon what he said had been his part in the slaying of Brown.<sup>6</sup>

## II. *The Majority Holding.*

My colleagues state their holding thus:

"Under the governing rule laid down by this court, en banc, in *Harling v. United States*, 111 U.S.App. D.C. 174, 295 F.2d 161 (1961), the admissions made March 21, may not be received in evidence in the criminal proceeding in District Court."

The *Harling* opinion which I joined will be mentioned in Part IV hereof, but I note now that it is completely distinguishable. Harling, age 17, had been arrested and *had been charged* with robbing and stabbing his victim. In that case we carefully defined our issue thus:

"The principal question concerns the admissibility of testimony by Government witnesses of damaging oral statements made by appellant while in police custody *when he was seventeen years old and before the Juve-*

<sup>5</sup> The officers later that morning but by noontime secured from Harrison a written confession which in our earlier opinion had been ruled inadmissible, and it is not here involved.

<sup>6</sup> The fact that the Juvenile Court on March 28, 1960 waived its jurisdiction is irrelevant to our issue.

nile Court had waived its 'original and exclusive jurisdiction.' D.C. Code, § 11-907." <sup>7</sup> (Emphasis added.)

Let us first test the applicability of the statute by reference to its terms.

### III. *The Statute to be Applied.*

The solicitude of our law for true juveniles who have been charged with crime is well described by Judge Leventhal. But it surely is so that not every youthful person under 21 is a ward of government, and even more certain that the Juvenile Court has no jurisdiction whatever over any such person unless there be presented to that court "cases" or "proceedings." The statute does not give that court jurisdiction over offenses, but over *persons charged in some case.*

The statute gives that court original and exclusive jurisdiction "of all cases and in proceedings" concerning "any person under 21 years of age *charged with having violated any law . . . prior to having become 18 years of age . . .*" (Emphasis added.) D.C. CODE § 11-907 (1961).

It is fundamental to our law that, absent a case or controversy, the Judicial branch has no jurisdiction.<sup>8</sup> That is also the plain concept of the Juvenile Court Act. Only when a person under 21 has been charged with an offense committed prior to his becoming 18 can the Juvenile Court acquire "original and exclusive jurisdiction" of such "cases" or "proceedings."<sup>9</sup> And so, "in the case of a child

<sup>7</sup> 111 U.S.App.D.C. at 174, 295 F.2d at 161.

<sup>8</sup> *Muskat v. United States*, 219 U.S. 346, 356 (1911); *United States v. Choate*, 276 F.2d 724, 728 (5 Cir. 1960). An accused, even a juvenile, must be properly before the court. *Ex parte Bain*, 121 U.S. 1, 13 (1887). So here, unless the Juvenile Court's jurisdiction shall have been invoked pursuant to the Act, there can be no proceeding. See *Pee v. United States*, *supra* note 3, 107 U.S.App. D.C. at 50, 274 F.2d at 559.

<sup>9</sup> And similarly if one sixteen years of age or older "*is charged with an offense*" which would be a felony if committed by an adult, the Juvenile Court may, in prescribed circumstances, waive its "jurisdiction." D. C. CODE § 11-914 (1961).

sixteen years of age or older *charged* with a felony, the Juvenile Court may either proceed with the case itself or waive its jurisdiction."<sup>10</sup> (Emphasis added.)

Yet the holding of our majority colleagues would bar Harrison's post age 18 statements even though he had not yet been charged in any court with the March 8 homicide. Carried to its ultimate conclusion, the court's ruling would exclude Harrison's admissions even if he had not been apprehended until he was twenty one. Surely the Congress never contemplated any such absurd result when it provided exceptional treatment for juvenile offenders, charged in the Juvenile Court.

I wish to dissociate myself from any such reading and application of a statute intended simply to define the jurisdiction of the Juvenile Court. Rather it seems clear to me that Juvenile Court jurisdiction over Harrison adhered *only* when, on the afternoon of March 21, Harrison for the first time was charged in the Juvenile Court with Brown's murder.<sup>11</sup>

#### IV. *The Holdings in the Harling*<sup>12</sup> *and Pee*<sup>13</sup> *Cases.*

In the *Harling* case the accused, aged 17, had been arrested on the evening of February 21, 1960. Thereupon, having been identified by a clerk at a lineup as one of two persons who had robbed a store and had stabbed the clerk, the accused was placed in the Receiving Home overnight, questioned, at the Robbery Squad the next morning, and later that afternoon, was further identified, this time by the store owner. The latter at the trial testified that when she identified Harling, he admitted in the presence of officers that he had taken part in the robbery but denied that he had stabbed the store clerk. Defense counsel objected on *Mallory* grounds to a detective's testimony concerning Harling's earlier statements to the same effect.

<sup>10</sup> *Pee v. United States*, *supra* note 3, 107 U.S.App.D.C. at 50, 274 F.2d at 559.

<sup>11</sup> And see note 6, *supra*.

<sup>12</sup> *Supra* note 4.

<sup>13</sup> *Supra* note 3.

The trial judge overruled the objection on the ground that Rule 5 and the *Mallory* doctrine did not apply to juveniles.

We pointed out that the Federal Rules of Criminal Procedure do not apply in juvenile proceedings which are purposely flexible, informal and essential if the Juvenile Court is to administer its *parens patriae* function.

"To avoid impairment of this function, the juvenile proceeding must be insulated from the adult proceeding. *This requires that admissions by a juvenile in connection with the non-criminal proceeding be excluded from evidence in the criminal proceeding.* We hold this requirement applicable in this case and in all similar cases in the future." <sup>14</sup> (Emphasis added.)

Obviously the instant case is not even remotely "similar."

The holding of the *Harling* case stemmed directly from the procedures created by our Juvenile Court Act to serve the best interests of a "child" who had been charged with the commission of crime before reaching the age of eighteen. Once charged, and once within the jurisdiction of the Juvenile Court, the juvenile would be subject to its procedures, depending upon whether the Juvenile Court retained that jurisdiction or waived the accused over to the District Court.

Harrison was not so charged, nor had he been held under the auspices of the Juvenile Court. He was already in jail pursuant to adult charges when confronted by his confederates. He was free to talk, and he did so. I submit that the only way the majority can assert that *Harling* bars such voluntary statements is by their now saying what *Harling* does not say. *Harling* actually says that if admissions "obtained in juvenile proceedings"

<sup>14</sup> 111 U.S.App.D.C. at 177, 295 F.2d at 164. Thus a majority of this court joined in the *Harling* ruling.

Moreover we expressly refrained from an intimation for views as to whether we would deem admissible, in an adult criminal trial spontaneous statements by a juvenile if those statements had not been made in the course of the permissible interrogation authorized by the Juvenile Court Act. *Ibid.* That question was not then before us.

before "*waiver of jurisdiction*" may be introduced in an adult proceeding after waiver, "*the juvenile proceedings*" are made to serve as an adjunct to and part of the adult criminal process. (Emphasis added.) 111 U.S.App.D.C. at 177, 295 F.2d at 164.

Even the reasoning of *Harling* belies the majority's present interpretation, as will be seen from the explanation in *Edwards v. United States*.<sup>15</sup>

In that case this court said:

"The *Harling* case bars the Government from using against an accused in a criminal trial a confession or admission officially obtained from him *when he was a juvenile detained under the auspices of the Juvenile Court*, where the latter court has subsequently waived its jurisdiction and transferred the accused for trial to the District Court. Our ruling in *Harling* resulted from the special practices which follow the apprehension of a juvenile. He may be held in custody by the juvenile authorities—and is available to investigating officers—for five days before any formal action need be taken. There is no duty to take him before a magistrate, and no responsibility to inform him of his rights. . . . *Harling* is a simple recognition that it would be unfair to the individual juvenile and a mockery of the juvenile system to allow unrestricted use of evidence, *gathered through such procedures*, in the adult court."<sup>16</sup> (Emphasis added.)

My colleagues say that the *Harling* opinion finds its foundation in *Pee v. United States*, *supra*. As pertinent here, that case involved three appellants seventeen years of age or younger who had been charged in the Juvenile Court with serious felonies. Held for two weeks under jurisdiction of the Juvenile Court before the cases were waived to the District Court, the accused had made statements to the police. As the *Edwards* case, *supra*, demonstrates, under Juvenile Court procedures but for Juvenile

<sup>15</sup> 117 U.S.App.D.C. 383, 330 F.2d 849 (1964).

<sup>16</sup> *Id.* at 384-85, 330 F.2d at 850-51.

Court purposes *only*, a person there charged is actually made "available to investigating officers."

So it was that this court held that such statements, so elicited, which could have been received in juvenile proceedings, were erroneously admitted against the appellants in the District Court trial after waiver. Judge Prettyman explained:

"Thus, in the case of a child sixteen years of age or older *charged with a felony*, the Juvenile Court may either proceed with the case itself or waive its jurisdiction."<sup>17</sup> (Emphasis added.)

The *Pee* case does not hold that a juvenile can not commit a crime. It does not hold that a person more than 18 years old can not effectively admit that he did commit a crime before he was 18. No such result can be attributed either to our cases or to the statute.

On the contrary, the statute contemplates as *Pee* makes evident, that a "child" is exempt from criminal processes and the results of a criminal trial *only* when he has been proceeded against as a juvenile. So it is that once *charged with a felony*, a person over 16 may be proceeded against in the Juvenile Court; that court may waive its jurisdiction over the person so that a case may go forward in the District Court; and the latter may determine either to exercise Juvenile Court powers exactly as would the Juvenile Court, or apply the usual federal criminal procedure. And if the latter course be decided upon, statements elicited from the juvenile while detained after he had been charged under the auspices of the Juvenile Court, may not be used against him at the criminal trial in the District Court.

That is all that the *Pee* case was talking about. It is all that *Harling* said. That is what *Edwards* explains. I decline to find in those cases or in the statute any basis whatever for what the majority now holds.<sup>18</sup>

<sup>17</sup> *Pee v. United States*, *supra* note 3, 107 U.S.App.D.C. at 50, 274 F.2d at 559. And see the text of D. C. CODE § 11-914 (1961) at set forth in note 1 of the majority opinion.

<sup>18</sup> The *en banc* majority observes in its note 11 that it does not "reach this *Escobedo* question." Of course it does not, for logically

I am unable to agree that a jurisdictional statute is to be so construed as to disable one over 18 not previously charged, from voluntarily stating that he was a murdering robber before he was eighteen. I think such evidence under the circumstances herein reviewed should be deemed competent.

So, I respectfully dissent.

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there can be no *Escobedo* problem if the majority is otherwise correct in its contention that Harrison's jail statement is to be barred because of his juvenile status.

In any event the *Escobedo* holding by its own terms is definitely limited and could have no applicability here. See *Cephus v. United States*, — U.S.App.D.C. —, — F.2d — (No. 18669, decided June 21, 1965), concurring opinion, slip op. 6; *rehearing en banc denied*, October 5, 1965.

Again, in *Jackson v. United States*, 119 U.S.App.D.C. 100, 104, 337 F.2d 136, 140 (1964), we commented specifically that "If there were a rule that a confession may not be received if made by an accused without counsel, that would be the end of this case—and of scores like it." *Certiorari* was denied, 380 U.S. 935 (1965).

[fol. 96]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Criminal No. 365-60

UNITED STATES OF AMERICA

vs.

EDDIE M. HARRISON ORSON G. WHITE,  
JOSEPH R. SAMPSON, DEFENDANTS

Washington, D. C.  
Tuesday, May 3, 1966.

The above cause came on for further trial before THE  
HONORABLE EDWARD M. CURRAN, United States  
District Judge, and a jury, at 10:00 a.m.

Appearances:

For the Government:

DAVID EPSTEIN, ESQ.  
Asst. U.S. Attorney

For Defendant Harrison:

GEORGE J. THOMAS, ESQ.  
ALFRED V. J. PRATHER, ESQ.

For the Defendant White:

WILLIAM A. DAVIS, ESQ.

For the Defendant Sampson:

HAROLD F. GOLDING, ESQ.

[fol. 99] MR. EPSTEIN: At this time, Your Honor,  
we will read from additional testimony given at a previous  
proceeding by Eddie MacArthur Harrison, a defendant  
in this case.

I shall read first from the direct examination where the defendant Harrison was questioned by his counsel.

MR. THOMAS: I object to the reading of this testimony.

THE COURT: Overruled.

MR. EPSTEIN: (Reading:)

"Question. Will you state your name?

"Answer. Eddie MacArthur Harrison.

"Question. And you have been at the D. C. Jail for several years, is that correct?

"Answer. Yes, sir."

This testimony was given on May 3rd, 1963.

"Question. Did you know George Brown?

[fol. 100] "Answer. Yes, I did.

"Question. Did you have occasion to see George Brown on March 8th, 1960?

"Answer. Yes, I did.

"Question. First, Mr. Harrison, how old were you on March the 8th, 1960?

"Answer. Seventeen.

"Question. And when did you become 18 years of age, if you know?

"Answer. March the 18th.

"Question. Of what year?

"Answer: 1960.

"Question. Now, you stated that there came a time when you saw George Brown on March the 8th, 1960, is that correct?

"Answer. Yes, sir.

"Question. Now, tell us, how did that come about?

"Answer. On March the 8th of 1960 I went to his house. I went to his house once or twice that morning. The first time I went to his house no one answered the door, so I went to Orson White's house; and when I came from his house, I went to Joseph [fol. 101] Sampson's house. After I went to Joseph Sampson and Orson White's house, we went to Mr. Brown's house.

"Question. Now, why did you go to Mr. Brown's house?

"Answer. I told Sampson to take me up to Fourth and R Streets where Mr. Brown lived."

MR. THOMAS: I object.

MR. GOLDING: I object on that.

THE COURT: What are you objecting about?

MR. THOMAS: He is not reading—

THE COURT: He is not reading the transcript?

MR. THOMAS: I'm sorry, Your Honor. I made a mistake.

MR. EPSTEIN: Now, on page 1308, where the direct examination is continued:

"Question. Now, Mr. Harrison, speak loudly. Now, at the close, just before the close of the session of Friday, this past Friday, I think the last question that was asked of you was whether or not you had gone to the residence of the premises of 1713 Fourth Street, Northwest, and in particular I asked you whether you had gone to where George Brown was, [fol. 102] and I believe you answered that you had two times, on March the 8th, 1960, is that correct?

"Answer. Yes, sir.

"Question. Now, let me divert from there and ask you this: Did there come a time on March the 8th when you were taken into custody by the police?

"Answer. Yes, sir, there did."

On page 1334:

"Question. Now, to go back now, Mr. Harrison, to the 8th of March, the morning of the 8th of March, 1960, you testified earlier that you saw George Brown two times on that—you went to his premises—

"Answer. I went to his house.

"Question. —to his premises two times that day. How did you come to go there the first time?

"The Court. How did he come to go where?

"Mr. Thomas. Well, I have identified he went to the premises 1713 Fourth Street, Northwest on the morning of March the 8th, 1960.

[fol. 103] "Question. How did you happen to go there the first time on that morning?

"Answer. The first time when I left my house that morning I got my shotgun from my house and put it in the car and went up to George Brown's house, but he wasn't there, or no one answered the door. I don't know whether he was there or not.

"Question. And what did you do after that?

"Answer. I went over to Orson White's house.

"Question. And did there come a time when you went back to 1713 Fourth Street, Northwest that morning of March 8th, 1960?

"Answer. Yes, sir.

"Question. Do you remember what time that was?

"Answer. Close to 9:00 o'clock, I think.

"Question. And did you go to George Brown's house?

"Answer. Yes, sir.

"Question. And did you see him?

"Answer. Yes, sir.

"Question. Tell us what happened there.

"Answer. Sampson drove me up in a car. He and [fol. 104] White were in the car. I told Sampson to take me up to Fourth and R Streets, I want to go up George's house.

"Question. You saw George Brown, didn't you?

"Answer. Yes, sir.

"Question. Tell us what happened there?

"Answer. When I went up to his house I went up there and knocked on the door and I didn't hear anything. I knocked on the door again. Someone said, 'Wait a minute,' so I waited.

"Question. Someone said what?

"Answer. 'Wait a minute.'

"Question. From inside the house?

"Answer. Yes.

"Question. All right.

"Answer. Then George came to the door. When he came to the door he pushed the shade and curtain back and looked out of the door. Then he pulled the door open and he saw me and he asked me did I have

anything for him. I told him yes. He said, 'Let me see it, come on in.' So, I had the shotgun in my hand. He asked me to let him see it. I picked it up to let [fol. 105] him see and was coming in, and he pushed the door in my face and the glass of the door hit the gun and the gun went off.

"Question. Now, was anyone there with you at that time?

"Answer. When the gun went off it knocked me back against the wall and I almost fell on the floor but I didn't fall down.

"Question. The question was, anyone with you at the time this happened?

"Answer. No, sir, nobody was with me.

"Question. Was the defendant White with you at that time?

"Answer. I didn't even know he was there.

"Question. Was he in the car when you left the car that morning to walk up these premises?

"Answer. Yes, sir.

"Question. All right. Now, what happened after the gun went off?

"Answer. After the gun went off I ran out the door.

"Question. Well, now, you have testified here that the effect of the gun going off caused you to fall [fol. 106] back. Will you tell us about that again?

"Answer. When it went off it surprised and scared me and knocked me back against the wall. There is a wall not too far from the door. And when it knocked me back against the wall I went out the door—I ran out the door, rather. And White was out on the steps and I almost ran into White on the steps.

"Question. And you ran away, is that correct?

"Answer. Yes, sir.

"Question. Now, did you go there with the intent to rob George Brown that morning?

"Answer. No, sir, I didn't plan on taking anything from him.

"Question. Why did you go there?

"Answer. To pawn the shotgun to him."

THE COURT: To what?

MR. EPSTEIN: (Reading:)

"To pawn the shotgun to him.

"Question. How long had you known George Brown before March the 8th, 1960?"

MR. THOMAS: Excuse me. On page 1339, the second line, you read that, "To pawn the shotgun to him."

[fol. 107] MR. EPSTEIN: "To pawn the shotgun to him again."

MR. THOMAS: Would you read the question and the answer, Mr. Epstein?

MR. EPSTEIN: Yes, sir.

"Question. Why did you go there?

"Answer. To pawn the shotgun to him again.

"Question. How long had you known George Brown before March 8th, 1960?

"Answer. For about a year or two years; something like that.

"Question. Had you ever done any of that kind of business with him before that?

"Answer. Pawning something with him?

"Question. Yes.

"Answer. Yes, sir.

"Question. Did you go there that morning to see George Brown with intent to use that gun to hurt him?

"Answer. No, sir."

This is the cross-examination by the prosecutor. *JS*

"Question. Mr. Harrison, you told us you were on two occasions to George Brown's house in the morning of March 8th, 1960, and, yet, you further [fol. 108] told us that when you saw the police officers on the afternoon of March the 8th of 1960, you told them you knew nothing about the death of George Brown, didn't you?

"Answer. Yes, sir.

"Question. Tell me, sir, did you make any report to any police officers about this death?

"Answer. I didn't know he was dead then.

"Question. You saw him hit?

"Answer. No, sir.

"Question. I see. You just ran from the noise?

"Answer. I ran when the glass broke, and I heard the boom.

"Question. I see. And you knew it was George Brown's place on 1713 Fourth Street that the officers were talking to you about on the 8th, did you not?

"Answer. Yes, sir, I knew they were talking about that.

"Question. And you told them nothing?

"Answer. No, sir.

"Question. You didn't tell them it was an accident then?

[fol. 109] "Answer. No, sir."

MR. THOMAS: Your Honor, may counsel come to the bench?

(AT THE BENCH:)

MR. THOMAS: Your Honor, I am going to object to his reading any further testimony there that has to do with any questions that he was asked or answered to the police.

MR. EPSTEIN: I intend to skip that.

THE COURT: He is going to skip that.

MR. THOMAS: Yes, but you just read a few.

MR. EPSTEIN: That was before anything had taken place.

MR. THOMAS: It had to do with his talking to the police.

Would you be careful about that, Mr. Epstein? Thank you.

Thank you, Your Honor.

(IN OPEN COURT:)

MR. THOMAS: Your Honor, would you permit counsel to come back once more?

(AT THE BENCH:)

MR. THOMAS: I would ask Your Honor also—this need not refer to the jury—but I would ask Your Honor

[fol. 110] to strike any questions and answers read by Mr. Epstein that had to do with what he told the police or what he was asked by the police.

MR. EPSTEIN: Your Honor, the question I read was before he had been arrested and had nothing to do with the questioning. It was denials by him.

MR. THOMAS: I understand that.

MR. EPSTEIN: I don't think the Court of Appeals decision goes to the point—every statement of the Court of Appeals decision goes to statements that were made after they were arrested before unnecessary delay.

MR. THOMAS: This is a case where he was under juvenile jurisdiction at the time, and he is actually reading questions and answers—

THE COURT: What question are you talking about?

MR. THOMAS: Your Honor, he read the last few questions.

THE COURT: Let's see what it is.

(Pause)

THE COURT: (Reading:)

"Question. Tell me, sir, did you make any report to any police officer about his death?

"Answer. I didn't know he was dead then.

[fol. 111] "Question. You saw him hit?

"Answer. No, sir.

"Question. I see. You just ran from the noise?

"Answer. I ran when the glass broke, and I heard the boom.

"Question. I see. And you knew it was George Brown's place on 1713 Fourth Street that the officers were talking to you about on the 8th, did you not?

"Answer. Yes, sir, I knew what they were talking about.

"Question. And you told them nothing?

"Answer. No, sir.

"Question. Didn't you tell them it was an accident?

"Answer. No, sir."

MR. THOMAS: The point I am making, Your Honor

THE COURT: There is no incriminating statement.

MR. THOMAS: But I just ask Your Honor to preclude his reading any further.

THE COURT: He said he wasn't going to read it.

MR. EPSTEIN: I am not going to read it.

[fol. 112] MR. THOMAS: Thank you, Your Honor.

(IN OPEN COURT:)

MR. EPSTEIN: On page 1355:

"Question. Now, this shotgun that you allegedly took to George Brown's to pawn, what time of the day did you first go to George Brown's?

"Answer. Early in the morning, about 7:00 o'clock, somewhere, it was early.

"Question. Early?

"Answer. Yes, sir.

"Question. And did you say you went back a second time?

"Answer. Yes, sir.

"Question. On this particular occasion, after some wait, George Brown opened the door and looked to see who was there.

"Answer. That's right.

"Question. And that door, sir, of his premises, opens inward, from the vestibule into the home, is that correct?

"Answer. That's right. If you are inside you have to pull it open.

"Question. I see. And he asked you what you [fol. 113] had, and you had the shotgun?

"Answer. That's right.

"Question. Now, you were carrying this shotgun, sir, loaded?

"Answer. It was, but I didn't know it was loaded.

"Question. You didn't know it was loaded?

"Answer. No, sir.

"Question. You didn't bother to check to see if it was loaded?

"Answer. No, when I got it back from him he must have loaded it.

"Question. You didn't bother to check to see if it was loaded?

"Answer. No, sir.

"Question. Tell me, you had it in the car, bouncing around in the back of the car?

"Answer. Yes, sir, when I got it out I threw it on the floor.

"Question. How long had you had this gun?

"Answer. How long I had had it?

"Question. That's right.

"Answer. Maybe two, three years.

[fol. 114] "Question. Two or three years?

"Answer. That's right. I had it, it stayed in my house a long time.

"Question. And it had been bouncing around in the back end of your car that particular day, too, is that correct?

"Answer. I didn't notice it was bouncing, but it must have been.

"Question. Well, let me ask you this, sir: Where did you park this particular vehicle when you went into George Brown's house the second time?

"Answer. I didn't park it; I wasn't driving.

"Question. You weren't driving? You had left Sampson to drive the car so you could leave in a hurry, is that correct?"

MR. THOMAS: Now, just a moment. I am going to object to the tone. When he reads direct he reads it with a soft tone. When he reads the cross-examination he reads it with a strong and forceful and even with emphasis, and I object and I ask Your Honor to direct the prosecutor to read it in the same tone of voice as he reads the direct, and I ask you to instruct the jury to disregard the tone that he has used.

[fol. 115] THE COURT: Very well, disregard the tone. Use the same tone.

MR. THOMAS: Thank you, Your Honor.

MR. EPSTEIN: (Reading:)

"Question. You weren't driving. You had left Sampson to drive the car so you could leave in a hurry?

"Answer. I don't understand, 'so he could leave in a hurry.'

"Question. You had been driving this same car earlier that morning at six or seven o'clock when you went there, is that correct?

"Answer. Yes, sir.

"Question. But you just casually gave it over to Sampson to drive while you allegedly went to pawn the gun?

"Answer. No, I let Sampson drive because I didn't have a permit to drive.

"Question. But you had been driving it that morning?

"Answer. Yes, sir.

"The Court. You were 17 years old at the time?

"The Witness. Yes, sir.

[fol. 116] "The Court. And you had had this gun for two or three years?

"The Witness. Not actually had it, my uncle left it in my house, and it's been in my house.

"The prosecutor.

"Question. And, of course, you were familiar with the proper manner of carrying a rifle or a shotgun?

"The Witness. I don't understand what he means.

"The Prosecutor.

"Question. Let me put it to you a little more explicitly, Mr. Harrison. Did you carry the gun, sir, as you walked from the car, parked a distance away from Mr. Brown's place, in your hand, with the barrel pointed out, up the street?

"Answer. Yes, sir."

"Question. Just carried it casually in the palm of your hand at your side, is that correct?

"Answer. Yes, sir.

"Question. In full view?

"Answer. Yes, sir.

[fol. 117] "Question. And when you got to the door, sir, you were asked for this shotgun by Brown, to let him see it, is that correct?

"Answer. That's right.

"Question. Then, sir, would you mind telling the ladies and gentlemen of the jury why you raised it to the level of almost six feet to show it?

"Answer. Yes, sir. When I was going to the door and he was slamming the door in my face, I tried not to let the gun hit the window, to keep it from breaking it, but it did.

"Question. So, sir, the gun was at your side and he asked to see it, and you raised it up and pointed at a six-foot level, sir, is that your testimony?

"Answer. No, sir.

"Question. Then, sir, I put it to you that if the door was closing on the gun, if it were at your side, as you have allegedly testified, the easier movement is not up but backward, isn't that correct?

"Now, sir, you have testified that you told Samp-  
[fol. 118] son to drive you to Fourth and R Street, North-  
west, on that date?

"Answer. Yes, sir.

"Question. And your friend White was with you at that time in the car?

"Answer. That's right.

"Question. And therefore they knew where you were going, to George Brown's?

"Answer. I don't know whether they knew I was going there; I told them to take me to Fourth Street.

"Question. But they knew they were going to Fourth and R Street, is that correct?

"Answer. Yes, sir.

"Question. And when you fled from the scene, you fled and were picked up in this car?

"Answer. Yes, sir.

"Question. And actually, sir, you fled right behind Orson White, isn't that correct?

"Answer. I ran into Orson down on the steps.

"Question. Is it not a fact, sir,"—

MR. GOLDING: I am going to object.

MR. THOMAS: May counsel come to the bench?

[fol. 119] THE COURT: What do you want now? I am not going to have bench conferences every ten minutes.

MR. THOMAS: Your Honor, I feel this ought to be stated out of the hearing of the jury. It is a question of law.

THE COURT: Very well.

(AT THE BENCH:)

MR. THOMAS: Your Honor, the reading of this testimony now, this particular last group of questions has to do with statements taken that were used by Mr. Smithson from the statements taken from these defendants, and he is basing his questions—

MR. EPSTEIN: That is not true.

MR. THOMAS: Well, he is basing his questions on the statements he had in his possession, and I think it is quite clear in there that that is what he is doing because Mr. Harrison was the first man to take the witness stand and he was questioned on the basis of that, and I feel that that testimony indicates that pretty clearly.

THE COURT: Well, here are the questions:

"Question. Now, sir, you have testified that you told Sampson to drive you to Fourth and R Street, Northwest on that date?

[fol. 120] "Answer. Yes, sir."

He has already testified before that he had.

"Question. And your friend White was with you at that time in the car?

"Answer. That's right.

"Question. And therefore they knew where you were going, to George Brown's?

"Answer. I don't know whether they knew I was going there; I told them to take me to Fourth Street.

"Question. But they knew you were going to Fourth and R Street, is that correct?

"Answer. Yes, sir.

"Question. When you fled from this scene, you fled and were picked up in this car?"

MR. THOMAS: Now, that has to come, that has to come from the fact that they had their statements, Your Honor.

THE COURT: I don't know.

MR. THOMAS: Well, I say I think you can conclude from that—I think Mr. Epstein would agree there were confessions from every one of these young men, and it has to be intermingled in the questioning of this witness, Your Honor. It has to be there. I don't think you can [fol. 121] get away with it. And of course that is a violation of the principles of law that have been set down—I forget the particular case. I know Your Honor is very familiar with it. It has to do with the fruits. And that is what is actually going through here. In other words, he is using the fruits of these confessions taken to make his cross-examination.

MR. EPSTEIN: Your Honor, defense counsel—

MR. THOMAS: Because he leads up to the statements and then he goes into it after he cross-examines. He goes into the statements themselves in order to—I believe it is the Silverthorne case, Your Honor; it's been a long time since I looked at it, but I believe it is the Silverthorne case that I am referring to that used the words fruit of the forbidden tree.

THE COURT: There is no way of me determining from the questions that they were obtained from a statement.

MR. THOMAS: Well, Your Honor, the question there, you were later picked up in a car, there was no testimony by Harrison about that.

THE COURT: Where is this later picked up in a car?

"Question. And when you fled from the scene, you fled and were picked up in this car?

"Answer. Yes, sir."

[fol. 122] MR. THOMAS: There is no testimony about that in the front, on direct examination there is no testimony, I think, on that point.

MR. EPSTEIN: But White has testified to that, to the car, picking them up.

MR. THOMAS: I am talking about Harrison's testimony.

THE COURT: Well, leave it out if there is anything obtained on cross-examining Harrison as a result of statements given by Harrison, I think you ought to leave them out.

MR. EPSTEIN: Well, Your Honor, right here, the next question that I was going to ask is:

"Is it not a fact, sir, that you heard his cross-examination"—referring to White's—"wherein he stated that in September of 1960 he had stated that he was on the vestibule besides you when you fired that gun?"

That was what counsel was immediately objecting to.

Now, that is a fact. The defendant Harrison was in the same courtroom and heard the cross-examination of the defendant White with reference to the location of the various people when the gun was fired. I can't see how counsel can argue that that is the result of any statement.

MR. THOMAS: He is building up a set of questions [fol. 123] for the purpose of using—he is using what he already knows from the confessions to set up questions for the purpose of using the confession to contradict or impeach later on.

THE COURT: That particular question couldn't be, because White testified he was there; and he testified while Harrison was in the courtroom, didn't he?

MR. THOMAS: Yes, he did.

THE COURT: I see nothing wrong with that particular question.

But if there are questions that are going to be asked as a result of information obtained by the statements, of course, that cannot be.

MR. THOMAS: At this point, Your Honor, I am going to move that all of the—I don't know how I can do otherwise than move that all of the testimony that has been read on the cross-examination—

THE COURT: That is denied. Let's proceed.

MR. EPSTEIN: How am I instructed to proceed?

THE COURT: I wouldn't ask him any more questions if those questions were asked as a result of information obtained by statements. You know it, I don't, because I haven't read the transcripts and I haven't read the statements.

[fol. 124] MR. EPSTEIN: I have read all that material, Your Honor, but—

THE COURT: I am not going to go all through that. There is no sense taking any chances. You will get reversed again.

MR. EPSTEIN: There was testimony by White with respect to the car.

THE COURT: That is already in.

MR. EPSTEIN: All right.

THE COURT: So you don't have to ask Harrison about it.

MR. EPSTEIN: Well, but, Your Honor, that is the point. Harrison, therefore, had to explain when he took the stand—

THE COURT: I will sustain the objection. Let's proceed. Don't overtry it.

(IN OPEN COURT:)

MR. EPSTEIN: Question on 1362:

"Question. Is it not a fact, sir, that you heard his cross-examination—

"And actually, sir, you fled right behind Orson White, isn't that correct?

"Answer. I ran into Orson down on the steps.

[fol. 125] "Question. Is it not a fact, sir, that you heard his cross-examination wherein he stated that in September of 1960 he had stated that he was on the vestibule besides you when you fired that gun?

"Answer. No, sir.

"Question. You don't recall that?

"Answer. No, sir. He was outside on the steps; he wasn't in there."

On page 1364—

MR. THOMAS: There is testimony that runs after the last question and answer on 1363, Mr. Epstein. There is testimony there.

MR. EPSTEIN: Would counsel like to stay here and advise me which portions of the testimony he wants?

MR. THOMAS: Page 1363, you read down to the third line and then you didn't continue.

MR. EPSTEIN: Your Honor, I understood counsel to be objecting.

THE COURT: That is what I thought, too. Would you make your mind up what you want in?

MR. THOMAS: All right.

MR. EPSTEIN: I will be glad to continue, Your [fol. 126] Honor, but I thought I was following the Court's ruling on counsel's objection.

MR. THOMAS: No, I prefer him to read that part.

THE COURT: All right, go ahead.

MR. EPSTEIN: Very well.

"Question. And you ran to this car?

"Answer. No, I forgot all about the car.

"Question. You just ran?

"Answer. That's right.

"Question. You were ultimately picked up by Sampson driving this car, is that correct?

"Answer. Yes, sir."

MR. THOMAS: Now I object to anything further.

MR. EPSTEIN: On page 1364:

"Question. Now, on this particular occasion, did you tell Sampson and White that you had shot Brown or discharged the gun up there?

"Answer. No, sir, I didn't know whether he was hit or hurt.

"Question. No, sir, I didn't ask you that. I asked you, did you tell them that you had shot or discharged that gun up there?

"Answer. I don't remember whether I even told [fol. 127] them or not. I think I told them later.

"Question. Had you arranged, when you left the car on Fourth Street, that you would be picked up on Third Street?

"Answer. No, sir.

"Question. Then you can't explain why Sampson would have moved the car, is that correct?"

MR. THOMAS: I am going to object.

MR. EPSTEIN: Would counsel stand here, please and advise me which portions he is going to object to?

MR. THOMAS: You are supposed to know which portions. You have knowledge even better than I do.

THE COURT: You stand there and tell him what you want or he will read the whole of it.

MR. THOMAS: I am reading from here (indicating), Your Honor.

THE COURT: All right. You object to this next question, is that it?

MR. THOMAS: I object to the question and answer he just read involving Sampson's name.

THE COURT: What was the question, again?

MR. EPSTEIN: "Then you can't explain why Sampson would have moved the car, is that correct?"

[fol. 128] MR. THOMAS: That is pretty obvious, Your Honor, where that came from.

THE COURT: I don't know where it came from. You say it's obvious, but it's not obvious to me.

MR. THOMAS: I will just make my objection, Your Honor.

THE COURT: Proceed.

MR. EPSTEIN: (Reading:)

"Question. What did you do with the shotgun?

"Answer. Took it home.

"Question. To your home?

"Answer. Yes, sir.

"Question. Where is it now?

"Answer. I don't know. I put it in the trash bin.

"Question. You put it in the trash bin, where?

"Answer. In my house.

"Question. Let me ask you, sir, on that morning did you call any police precinct or any hospital and notify them that a man might have been injured at 1713 Fourth Street?

"Answer. No, sir, I didn't.

"Question. It didn't concern you?

[fol. 129] "Answer. I guess it did. I can't explain why I didn't. I should have but I didn't."

No further testimony, Your Honor, from this transcript.

THE COURT: Mr. Thomas, have you—

MR. EPSTEIN: May we approach the bench?

MR. THOMAS: I have nothing to read on cross-examination. Thank you, Your Honor.

THE COURT: Very well.

(AT THE BENCH:)

MR. EPSTEIN: Your Honor, that is the Government's case in chief.

I would like to be heard on the issue of lesser included offenses as part of the felony murder. I brought in an authority on the point that recognizes second degree murder.

THE COURT: Denied.

MR. THOMAS: At this time, Your Honor, I move for a directed verdict of acquittal.

THE COURT: That is denied.

Do you move, too?

MR. GOLDING: I do.

THE COURT: That is denied.

[fol. 130] Do you move, too?

MR. DAVIS: Yes.

THE COURT: That is denied.

MR. THOMAS: Your Honor, may I put in my reasons?

THE COURT: Certainly.

MR. THOMAS: Your Honor, the Government has shown none of the elements of robbery in this case, not one.

THE COURT: That is for the jury to decide. They were up there with a shotgun.

MR. THOMAS: But, Your Honor, they haven't shown what I said before, corpus delicti.

THE COURT: I have ruled on that. You put it in the record they haven't proved a prima facie cause, and I have denied it.

MR. THOMAS: Your Honor, I want to renew all the motions made.

THE COURT: All are renewed, and all are denied.

MR. PRATHER: Your Honor, I want to be sure it is understood that the defendant Harrison objects to the use of his testimony on the grounds of the Fifth Amendment.

THE COURT: Yes, I understand all that. The Fifth Amendment has got nothing to do with this case.

MR. PRATHER: Your Honor, he is being compelled [fol. 131-135] to be a witness against himself in this case.

THE COURT: No, he is not. Any time he makes a judicial statement in the court the Government is entitled to use it.

We will take a recess.

(RECESS)

BW fws.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Criminal No. 365-60

UNITED STATES OF AMERICA

v.

EDDIE M. HARRISON

JUDGMENT AND COMMITMENT (REV. 7-52)—  
Filed May 20, 1966

On this 13th day of May, 1966 came the attorney for the government and the defendant appeared in person and <sup>1</sup> by his counsel, George J. Thomas and Alfred V. J. Prather.

IT IS ADJUDGED that the defendant has been convicted upon his plea of <sup>2</sup> not guilty and a verdict of guilty of the offense of

• FIRST DEGREE MURDER WITH  
RECOMMENDATION OF LIFE IMPRISONMENT

as charged <sup>3</sup>

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the rest of his natural life, pursuant to the provisions of the Code of Laws of the District of Columbia.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States

Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Edward M. Curran.  
United States District Judge

\_\_\_\_\_  
Clerk

<sup>1</sup> Insert "by counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

<sup>2</sup> Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

<sup>3</sup> Insert "in count(s) number \_\_\_\_\_" if required.

<sup>4</sup> Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

<sup>5</sup> Enter any order with respect to suspension and probation.

<sup>6</sup> For use of Court wishing to recommend a particular institution.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 20,280

EDDIE M<sup>o</sup> HARRISON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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No. 20,281

ORSON G. WHITE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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Appeals from the United States District Court  
for the District of Columbia

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Decided May 18, 1967

*Mr. Alfred V. J. Prather* (appointed by this court) for appellant in No. 20,280.

*Mr. George J. Thomas* (appointed by this court) for appellant in No. 20,281.

*Mr. Robert Kenly Webster*, Assistant United States Attorney, with whom *Messrs. David G. Bress*, United States Attorney, and *Frank Q. Nebeker*, Assistant United States Attorney, were on the brief, for appellee.

Before BASTIAN, *Senior Circuit Judge*, and MCGOWAN and ROBINSON, *Circuit Judges*.

ROBINSON, *Circuit Judge*: Appellants, Eddie M. Harrison and Orson G. White, and a co-defendant, Joseph R. Sampson, were convicted in October, 1960, of the felony-

murder of George H. "Cider" Brown.<sup>1</sup> Death sentences, then mandatory, were imposed.<sup>2</sup> The case submitted by the Government, and accepted by the jury, was that Brown was killed by a blast from Harrison's shotgun in the course of an attempt to perpetrate a robbery espoused by the trio. While an appeal was pending, it came to light that one Daniel Jackson Oliver Wendel Holmes Morgan, a layman impersonating a member of the District of Columbia bar,<sup>3</sup> had represented White and Sampson throughout the trial and Harrison during its post-verdict stages,<sup>4</sup> a discovery that led to a new trial.<sup>5</sup> In April, 1963, appellants and Sampson were again found guilty, the jury recommending life imprisonment for each, to which they were sentenced.<sup>6</sup> These convictions were reversed because statements they had made to police officers had been improperly admitted.<sup>7</sup>

<sup>1</sup> "Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree." D.C. Code § 22-2401 (1961 ed.). Another count, charging Brown's premeditated murder, was dismissed on the Government's motion during the trial.

<sup>2</sup> D.C. Code § 22-2404 (1961 ed.).

<sup>3</sup> See *Morgan v. United States*, 114 U.S.App.D.C. 13, 309 F.2d 234 (1962), cert. denied, 373 U.S. 917 (1963).

<sup>4</sup> Harrison's trial counsel died before the hearing and determination of his post-verdict motions and Morgan represented him in the ensuing District Court proceedings.

<sup>5</sup> We first remanded in order that each of the three appellants might move for a new trial. After they disaffirmed motions therefor filed by new counsel, we reinstated the appeal and *sua sponte* vacated the convictions with direction that a new trial be awarded. See *Harrison v. United States*, 123 U.S.App.D.C. 230, 232-33, 359 F.2d 214, 216-17 (1965).

<sup>6</sup> D.C. Code § 22-2404 was amended in 1962 to authorize these sentences.

<sup>7</sup> See *infra*, note 15.

The third trial, in May, 1966, from which this appeal emanated, was atypical. Since some of the witnesses participating earlier had either died or could not be located, the Government's presentation consisted largely in a reading into evidence of testimony given at the second trial by appellants and the absent witnesses. At the close of its case in chief, the trial judge directed a judgment of acquittal in Sampson's favor but denied similar motions by appellants. Offering no evidence in defense, appellants once more were convicted and, on recommendation of the jury, were sentenced to life imprisonment.

As grounds for reversal appellants urge (a) that they were denied a speedy trial, (b) that the admission of their second-trial testimony was improper, and (c) that there was insufficient evidence that a robbery was in progress when the homicide occurred to convict them of felony-murder. We discuss but reject these contentions, and affirm as to Harrison. The record, however, reveals serious error in the admission at this trial of portions of the testimony White gave at the first trial, and this requires reversal of his conviction.

# I

The contention that appellants' Sixth Amendment right to a speedy trial<sup>8</sup> has not been respected is predicated broadly upon the six-year lapse between the homicide and the third trial, but for this purpose we cannot treat litigation spans in a vacuum. "There is no touchstone of time which sets a fixed maximum period that automatically requires application of the Sixth Amendment and dismissal of the indictment."<sup>9</sup> Rather, "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice."<sup>10</sup> So in determining whether the delay com-

<sup>8</sup> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. Const., amend. VI.

<sup>9</sup> *Hedgepeth v. United States*, — U.S.App.D.C. —, 364 F.2d 684, 687 (1966).

<sup>10</sup> *Beavers v. Haubert*, 198 U.S. 77, 87 (1905).

plained of assumes constitutional proportions, we examine the circumstances<sup>11</sup> closely to ascertain whether it was "arbitrary, purposeful, oppressive or vexatious."<sup>12</sup>

On the second appeal, appellants pressed a similar claim with respect to the time the case had consumed to that point. We unanimously rejected it for the reasons then expressed and repeated below.<sup>13</sup> Viewing additionally the period since ensuing, we find no reason to now conclude differently.

The present argument focuses upon the interval of approximately two years during which the second appeal was pending. Here undoubtedly is "a spot where the ideal

<sup>11</sup> "Whether delay in completing a prosecution. . . amounts to an unconstitutional deprivation of rights depends upon the circumstances." *Pollard v. United States*, 352 U.S. 354, 361 (1957). See also *United States v. Ewell*, 383 U.S. 116, 120 (1966); *Hedgepeth v. United States*, *supra* note 9, 364 F.2d at 687; *Smith v. United States*, 118 U.S.App.D.C. 38, 41, 331 F.2d 784, 787 (*en banc* 1964).

<sup>12</sup> *Smith v. United States*, *supra* note 11, 118 U.S.App.D.C. at 41, 331 F.2d at 787. See also *Pollard v. United States*, *supra* note 11, 352 U.S. at 361-62.

<sup>13</sup> "Following their first appeal, they could have been tried in the Fall of 1961 if they had followed this court's original suggestion that they move for a new trial. They refused to do so, and as noted, *supra*, this court, *sua sponte*, was obliged to reinstate the appeals and, on June 12, 1962, to enter an order vacating the original judgments of conviction. That order was filed in the District Court July 3, 1962. The District Court then assigned the case for trial on October 17, 1962. By that date there had been hearings on motions of various court-appointed counsel for leave to withdraw; Harrison had no attorney; Attorney David, appointed October 30, 1962, thereafter sought a continuance contending that he had no transcript of the first trial; Harrison then moved that Attorney David be discharged; motions to dismiss on double jeopardy grounds had been filed and argued; in short, on one basis or other, the District Court was occupied with a series of defense motions, some purportedly of substance, some procedural, but all contributing to delay.

"The unique problems stemming in the first place from Sampson's and White's having engaged the imposter Morgan gave rise to the several dilatory moves. No prejudice in fact was shown. Nor were the 'circumstances' such as to deprive the appellants of constitutional rights." *Harrison v. United States*, *supra* note 5, 123 U.S.App.D.C. at 233, 359 F.2d at 217.

crashes head-on with the practical.”<sup>14</sup> and appellants’ position reflects but scant recognition of the exigencies of appellate review in abnormal cases. That appeal was first argued in December, 1963, before a panel of the court. One of the several difficult questions involved, we decided, was so important as to require determination by the entire court. In June, 1965, the cases were reargued and in December of that year the convictions were reversed. The combinational effect of the panel and *en banc* decisions was to bar from subsequent use all incriminating extrajudicial statements made by appellants.<sup>15</sup>

The time necessarily consumed in unraveling complex issues whose ultimate resolution vindicates the rights of the accused can hardly be said to constitute purposeful or oppressive delay. We are accustomed to careful study of the questions presented to us, particularly where human life or liberty is at stake, and surely this case has tolerated no deviation. “[T]he essential ingredient is orderly expedition and not mere speed”;<sup>16</sup> indeed, “[a] requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.”<sup>17</sup> One has but to examine the comprehensive opinions the second appeal brought forth to appreciate the court’s task and foresee the risk that unwarranted haste might have worked to

<sup>14</sup> *King v. United States*, 105 U.S.App.D.C. 193, 195, 265 F.2d 567, 569 (*en banc*), cert. denied 359 U.S. 998 (1959).

<sup>15</sup> *Harrison v. United States*, *supra* note 5. The panel held that written statements taken from the three defendants by police and jail classification officers were ~~banned~~ by *Mallory v. United States*, 354 U.S. 449 (1957), and *Killough v. United States*, 114 U.S.App. D.C. 305, 315 F.2d 241 (*en banc* 1962), 119 U.S.App.D.C. 10, 336 F.2d 929 (1964). The subject of *en banc* consideration was the admissibility of oral statements Harrison made a few days after his eighteenth birthday but a week prior to waiver to the District Court of jurisdiction over the affair, which occurred while he was a juvenile. The panel held that they had properly been received in evidence but a majority of the full court ruled otherwise on the basis of *Harling v. United States*, 111 U.S.App.D.C. 174, 295 F.2d 161 (*en banc* 1961).

<sup>16</sup> *Smith v. United States*, 360 U.S. 1, 10 (1959).

<sup>17</sup> *United States v. Ewell*, *supra* note 11, 383 U.S. at 120.

appellants' disadvantage. And there is no hint that any subsequent phase of this case radiates any constitutional implication.

Nor do we deem it likely or reasonably possible that appellants could have been prejudiced by the delay.<sup>18</sup> The only concrete suggestion in that direction is that the absence of some of the Government's witnesses and the resulting need to read their prior testimony to the jury precluded additional cross-examination. But appellants had, and utilized, the opportunity to question those witnesses fully during the second trial, and at the third trial they were free to present to the jury the prior cross-examinations but elected not to do so. We are unable to identify any harm to appellants consequent upon the passage of time.

## II

At the second trial, after the Government had introduced the post-arrest statements later outlawed on the second appeal,<sup>19</sup> appellants themselves took the witness stand to relate events calculated to establish their innocence. The Government, as part of its case in chief at the third trial, introduced portions of the testimony appellants gave at the second trial. To this appellants register objection, asserting that they testified at the second trial only because the statements had been received in evidence thereat.

The Government's submissions from appellants' second-trial versions did not violate their privilege to remain silent at the third.<sup>20</sup> Nor do the rules authorizing intro-

<sup>18</sup> See *United States v. Ewell*, *supra* note 11, 383 U.S. at 121-23; *Hedgepeth v. United States*, *supra* note 9, 364 F.2d at 687.

<sup>19</sup> See *supra* note 15.

<sup>20</sup> *Edmonds v. United States*, 106 U.S.App.D.C. 373, 375-78, 273 F.2d 108, 110-13 (*en banc* 1959), *cert. denied* 362 U.S. 977 (1960); *Warde v. United States*, 81 U.S.App.D.C. 355, 158 F.2d 651 (1946). Compare *Milton v. United States*, 71 App.D.C. 394, 110 F.2d 556 (1940). See also *Orth v. United States*, 252 Fed. 569 (4th Cir. 1918); *Heller v. United States*, 57 F.2d 627 (7th Cir.), *cert. denied* 286 U.S. 567 (1932); *United States v. Grunewald*, 164 F.Supp. 644 (S.D.N.Y. 1958); *People v. Corbo*, 17 App.Div.2d 351, 234 N.Y.S.2d 662 (1962); *Rufferty v. State*, 91 Tenn. 655, 16 S.W. 728 (1891). See generally McCormick, *Evidence*, § 131 (1954); Annot. 5 A.L.R. 2d 1404 (1949).

duction of prior-trial testimony feature an exemption of that given by an accused.<sup>21</sup> And while wholesale transcriptive renditions are decidedly less desirable than live evidentiary presentations, we cannot chide the practice where the testimony of witnesses no longer available is indispensable to proof of elements of the Government's case and is confined to that purpose. We are thus brought to appellants' contention that their testimony was involuntary because it was incited by the admission of the subsequently banned post-arrest statements, and on that basis was insulated against prosecutive service at the third trial.

Our federal system bestows upon an accused the choice of testifying or not, and permits what he says from the witness stand to be used against him if not elicited coercively. The record contains no suggestion that the use of the statements at the second trial was a maneuver to wring evidence from appellants; from aught that appears, the Government's sole objective was to supply missing elements of its case. Here, unlike situations where duress of some sort has been found, the Government exerted no pressure,<sup>22</sup> offered no inducement<sup>23</sup> and imposed no improper condition upon appellants' right to muteness.<sup>24</sup> There was uninhibited access to counsel,<sup>25</sup> and so far as we can perceive, complete awareness of legal rights.<sup>26</sup> We have been referred to no case, and our own intensive research has located none, holding that the strength of the Government's case is itself a vitiating form of testimonial compulsion.

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<sup>21</sup> See the cases cited *supra* note 20.

<sup>22</sup> Compare, e.g., *Rock v. Patz*, 367 U.S. 433 (1961); *Payne v. Arkansas*, 356 U.S. 560 (1958).

<sup>23</sup> Compare, e.g., *Spano v. New York*, 360 U.S. 315 (1959).

<sup>24</sup> Compare, e.g., *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967).

<sup>25</sup> Compare, e.g., *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Haynes v. Washington*, 373 U.S. 503 (1963).

<sup>26</sup> Compare, e.g., *Davis v. North Carolina*, 384 U.S. 737 (1966).

We may profitably resort to an analogy that to us is quite persuasive. If appellants, with their counsel present, and thus presumably cognizant of their prerogatives, had voluntarily spoken extrajudicially, their utterances would have been admissible on the Government's proffer. This would be so, we think it clear, even if the remarks had attempted exoneration in the face of strong or even overwhelming indicia of guilt. We are unable to dissent from these results when, with the same predicates in the case before us, the statements were made at a judicial trial, where appellants were surrounded by the full panoply of legal protections. Their second-trial accounts of the fatal episode lost none of their qualities of admissibility merely because they were rendered in open court or were induced by an evaluation of the capabilities of the Government's proof to convict.

Nor do we consider the re-read portion of appellants' testimony to be proscribed by the familiar "fruit of the poisonous tree" rationale. We may assume, as appellants assert, that had their post-arrest declarations not gotten into evidence at the second trial, they would not have taken the witness stand. The vital inquiry, however, for ascertaining productivity as between the improper admission of the statements and appellants' countervailing testimony is not whether "but for" receipt of the statements the testimony would not have been given, but "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." <sup>27</sup>

There is, we again note, not even a whisper that the Government, in utilizing the statements at the second trial, was motivated by a purpose to elicit a testimonial response from appellants. Moreover, as we have several times held, the testimony of a live witness does not stand on the same evidentiary footing with "an inanimate and

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<sup>27</sup> *Wong Sun v. United States*, 371 U.S. 471, 488 (1963), quoting *Maguire, Evidence of Guilt* 221 (1959).

immutable object illegally come by.”<sup>28</sup> We have emphasized that the witness “is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give.”<sup>29</sup> While his testimony would, of course, be impermissible if obtained by capitalizing on prior illegality,<sup>30</sup> the question is always “how great a part the particular manifestation of ‘individual human personality’ played in the ultimate receipt of the testimony in question.”<sup>31</sup>

Here the role of the “individual human personality,” we think, was paramount. What is true of a volitional exercise by a witness whose testimony may be compelled must, absent coercion, be the more so as to an accused who enjoys an absolute privilege to stay silent and, as well, the professional advice of competent counsel as to whether the privilege is to be renounced. Appellants admittedly made a conscious tactical decision to seek acquittal by taking the stand after their in-custody statements had been let in, and the record reflects an appreciable interval for the interaction of mental processes preceding this decision and the testimonial acts themselves.<sup>32</sup> It would be rash to assume that defendants facing the death penalty upon conviction would be unduly influenced to testify favorably to the Government by either the introduction of the prior confessions or their procurement three years previously. In the circumstances here, we deem the

<sup>28</sup> *Brown v. United States*, No. 19890, D.C. Cir., December 30, 1966, at 7. See also *McLindon v. United States*, 117 U.S.App.D.C. 283, 285-86, 329 F.2d 238, 240-41 (1964); *Smith v. United States*, 117 U.S.App.D.C. 1, 3, 324 F.2d 879, 881 (1963), cert. denied 377 U.S. 954 (1964); *Payne v. United States*, 111 U.S.App.D.C. 94, 97-98, 294 F.2d 723, 726-27, cert. denied 368 U.S. 883 (1961).

<sup>29</sup> *Smith v. United States*, supra note 28, 117 U.S.App.D.C. at 3, 324 F.2d at 881.

<sup>30</sup> See, e.g., *Smith v. United States*, 120 U.S.App.D.C. 160, 344 F.2d 545 (1965).

<sup>31</sup> *McLindon v. United States*, supra note 28, 117 U.S.App.D.C. at 286 n. 2, 329 F.2d at 241 n. 2.

<sup>32</sup> See *Brown v. United States*, supra note 28, at 16 (concurring opinion).

relationship between the erroneous admission of appellants' statements and their testimony at the second trial to be "so attenuated as to dissipate the taint."<sup>33</sup>

### III

We now scrutinize the evidence to test its legal sufficiency to support Harrison's conviction of felony-murder. The Government's theory, we reiterate, was that he and his co-defendants conspired to rob Brown and that Harrison shot Brown while attempting to consummate the plot. Harrison's retort, made testimonially at the second trial, was that the charge which fatally wounded Brown was fired accidentally as he approached Brown for a loan on his shotgun. Since there were no living eyewitnesses to the shooting, save Harrison and possibly White, the Government's case was largely circumstantial.

Shortly after 9:00 a.m. on March 8, 1960, Brown's body was found just inside the front door of his residence. The door, which opened inwardly, was closed, wedged by the body propped face-first against it. The window in the door had been shattered by a force originating externally and there was a hole through the window shade. There were powder burns on Brown's face and the window shade. Brown had died from a wound inflicted by a single blast from a shotgun. The charge had traveled through his head from front to back along an approximately horizontal course veering slightly from right to left.

On the night before the homicide, appellants and Sampson borrowed a black Buick sedan from a friend. About 8:00 o'clock on the next morning—approximately an hour prior to Brown's death—they reassembled in the Buick, and shortly thereafter were linked to the deceased. A Government witness, Thomas Young, seated with Brown in a restaurant that morning noticed Sampson looking at Brown. When Young and Brown left the restaurant, Sampson followed and walked a short distance to a black Buick in which two men were seated. While conversing with Brown, Young saw Sampson talking to the men inside the Buick minutes before Brown drove off alone.

<sup>33</sup> *Nardone v. United States*, 308 U.S. 338, 341 (1939).

It is undisputed that not appreciably later Harrison and his companions arrived at Brown's house in the Buick. One version of the events then transpiring was supplied by Harrison's own testimony. In contemplation of a loan from Brown to be obtained upon a pawn of his shotgun, he had placed the weapon in the Buick earlier that morning, unaware of the fact that it was loaded. Alighting at Brown's house, he removed the shotgun from the car and carried it at his side to Brown's front door. Brown responded to his knock, opened the door and, learning of the transaction Harrison had in mind, said "Let me see it, come on in." Entering, Harrison raised the shotgun from his side in order that Brown might examine it but Brown suddenly pushed the door closed. The glass in the door struck the shotgun and caused it to discharge. Harrison then ran, colliding with White who stood outside on the steps nearby. Both rejoined Sampson in the Buick and together they made off.

But while Harrison's testimony was the largest segment of direct evidence bearing on the affair, the Government's case, and to some extent Harrison's own defense, disclosed circumstances impinging upon the story he related. There is evidence indicating that the shotgun had been aimed at Brown. The shot, fired through the front door window, left a gaping, macerated wound in the right side of Brown's face, and Brown was six feet tall. The trajectory of the charge through Brown's head suggests that the shotgun when fired had not only been raised, as Harrison said, but was in a nearly horizontal position at shoulder level. However this may be, it is immaterial whether the shotgun was discharged intentionally or accidentally if in fact a robbery was then being attempted.<sup>34</sup> And we deem the proof legally sufficient to support a verdict predicated upon the thesis that such was the case.

There was evidence tending to show that both Harrison and White needed money. Harrison proposed to borrow money from Brown. White used marijuana cigarettes, and was unemployed. Admittedly, both had gotten to-

<sup>34</sup> See *supra* note 1; *Harrison v. United States*, *supra* note 5, 123 U.S.App.D.C. at 236 n. 17, 359 F.2d at 220 n. 17.

gether earlier that day to look for a job. Brown had money, and that this fact was known is also clearly suggested. Harrison knew that Brown was a "fence" and had previously dealt with him in that capacity. About \$2,000 was found in Brown's pocket after his death. Young testified that he knew that Brown had money on his person that day.

The evidence also indicated circumstantially an intent to rob Brown. Harrison, with White and Sampson, had borrowed an automobile the night before. The jurors could have believed Young's testimony that he saw Sampson at the restaurant and found that he then had Brown under surveillance. They might also have accepted the inference from Young's testimony that appellants were the other two men in the Buick. They could have concluded that something involving appellants and the deceased was afoot.

Harrison approached Brown's residence with a shotgun that was loaded.<sup>35</sup> It was a weapon that could easily have been concealed under his coat.<sup>36</sup> Harrison said that White was with him in the vestibule of Brown's residence when the fatal shot was fired. Sampson concededly remained in the automobile parked nearby. After Brown was shot, neither Harrison nor White stopped to render possible aid, but instead took immediate flight.<sup>37</sup> The jury was not bound to ignore these earmarks of a planned robbery by two co-conspirators with the third standing by with the getaway car. And if the jury rejected Harrison's explanation that the shooting was committed accidentally under innocent circumstances, the evidence was sufficient to support a verdict predicated upon the view that it occurred while a robbery was in progress.

<sup>35</sup> Compare *Accardo v. United States*, 102 U.S.App.D.C. 4, 249 F.2d 519 (1957), cert. denied, 356 U.S. 943 (1958).

<sup>36</sup> A Government witness residing across the street from Brown's house saw a male come out of Brown's doorway immediately after the shot "and put something under his coat, a gun, and ran down the street. . ."

<sup>37</sup> See *Miller v. United States*, 116 U.S.App.D.C. 45, 320 F.2d 767 (1963); *Hunt v. United States*, 115 U.S.App.D.C. 1, 4, 316 F.2d 652, 655 (1963).

The crucial inquiry called for is not whether we ourselves are convinced beyond a reasonable doubt of Harrison's guilt but whether on the proof adduced the jury legitimately could have been. Our role in making this adjudication "is exhausted when [we determine] . . . that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind."<sup>38</sup> We conclude that as to Harrison it does.

#### IV

We turn next to considerations peculiarly affecting White. He had taken the stand as a witness in his own behalf at both of the first two trials. During the second trial, the Government resorted to parts of his testimony at the first trial in an effort to cast doubt on what he said at the second, and the portions of his second-trial testimony read to the jury at the third trial included sizeable excerpts from the testimony he had given at the first trial. The fact that he was represented at the first trial by the imposter Morgan spotlights the problem: at the trial from which the instant appeal was taken, the Government's evidentiary presentation embraced testimony White had given at the first trial when he was not represented by a member of the bar.

The Sixth Amendment pledges that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This adjuration necessitates "the guiding hand of counsel at every step in the proceedings against him,"<sup>39</sup> including "the giving of effective aid in the preparation and trial of the case."<sup>40</sup> It is clear that these demands are not satisfied when the accused is "represented" by a layman mas-

<sup>38</sup> *Curley v. United States*, 81 U.S.App.D.C. 389, 392, 160 F.2d 229, 232, cert. denied 331 U.S. 837 (1947).

<sup>39</sup> *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

<sup>40</sup> *Id.* at 71.

querading as a qualified attorney; <sup>41</sup> it is unthinkable that so precious a right, or so grave a responsibility, can be entrusted to one who has not been admitted to the practice of the law, no matter how intelligent or well educated he may be. This is particularly so where, as here, the accused is on trial for an offense upon conviction of which his very life could become forfeit.

Failure to heed the constitutional admonition that the accused enjoy the right to assistance of counsel negates completely the court's jurisdiction to proceed.<sup>42</sup> The proceeding is void, the occurrences therein are vitiated; transpirations otherwise legal go for naught. No less than this was implicit in our disposition of this case shortly after Morgan's deception was uncovered, as we had occasion to observe upon the second appeal.<sup>43</sup>

It cannot be doubted that the Government's introduction into evidence of the statements White made during a period when he was without counsel impinges rights the Constitution renders inviolate. A quarter of a century ago, this Court, in *Wood v. United States*,<sup>44</sup> appraised the effect of a denial of the right to counsel upon the accused's privilege against self-incrimination. We held that a withdrawn plea of guilty entered by an uncounseled defendant at a preliminary hearing was improperly received in evidence at the trial and regarded the absence of counsel as a key factor in determining whether the plea was voluntarily entered. Quite recently the Supreme Court, in

<sup>41</sup> Representation by unlicensed "counsel" was held to deny constitutional rights in *McKinzie v. Ellis*, 287 F.2d 549 (5th Cir. 1961); *Jones v. State*, 57 Ga.App. 344, 195 S.E. 316 (1938); *Smith v. Buchanan*, 291 Ky. 44, 163 S.W.2d 5 (1942); *Jackson v. State*, 316 P.2d 213 (Okla. Crim. 1957); *Martinez v. State*, 167 Tex.Crim. 97, 318 S.W.2d 66 (1958). See also *Achtien v. Dowd*, 117 F.2d 989 (7th Cir. 1941).

<sup>42</sup> *Johnson v. Zerbst*, 304 U.S. 458, 468 (1939); *Coplon v. United States*, 89 U.S.App.D.C. 103, 113-14, 191 F.2d 749, 759-60 (1951), cert. denied 342 U.S. 926 (1952).

<sup>43</sup> *Harrison v. United States*, supra note 5, 123 U.S.App.D.C. at 233, 359 F.2d at 217.

<sup>44</sup> 75 U.S.App.D.C. 274, 128 F.2d 265, 141 A.L.R. 1318 (1942).

*White v. Maryland*,<sup>45</sup> reached the same result through application of the Sixth Amendment to an identical situation, and subsequent decisions have epitomized the Amendment's ban upon evidentiary uses of statements made by an accused at a time when he was entitled to but not accorded the assistance of competent counsel.<sup>46</sup>

The prejudice resulting from admission of White's first-trial testimony is apparent. The strongest evidence at the third trial linking White to the crime was his own testimony at the second trial, without which there is little to place him immediately at the scene of the shooting or to involve him in preparations to rob Brown. Thus it was crucial to the Government's case that White's second-trial testimony be discredited, and in this the impeaching statements from the first trial played a central role.

At the second trial, White stated that he did not know why Harrison wanted to see Brown and maintained that he did not see Harrison place anything into or remove anything from the back seat of the car before Harrison went to Brown's house. The Government countered with testimony that he had seen an object placed on the back seat and that on its removal he had noted that it was a shotgun. White also testified at the second trial that he could not see which house Harrison went into, and was confronted with his previous testimony indicating that he had seen the house. White later testified at the second trial that he did not follow Harrison into the vestibule of Brown's house, and the prosecutor brought forward statements made at the first trial suggesting that he had gone to the vestibule. Finally, White swore at the second trial that he was smoking marijuana on the morning of the homicide and that his senses were confused. The Government responded with White's testimony at the first trial omitting all reference to marijuana or disorientation.

It cannot be doubted that the impact of White's first-trial statements upon his second-trial assertions of innocence and his credibility was devastating. Four material

<sup>45</sup> 373 U.S. 59 (1963).

<sup>46</sup> *Massiah v. United States*, 377 U.S. 201 (1964); *Escobedo v. Illinois*, *supra* note 25; *Miranda v. Arizona*, 384 U.S. 436 (1966).

aspects of his story were impugned: that he did not know that Harrison had a shotgun, that he was initially unaware of the fact that Harrison went to Brown's house, that he was not in the vestibule when the shotgun was fired, and his mind was befuddled by marijuana. And each of the damaging statements had been elicited on White's direct examination by Morgan, his erstwhile protector.

We are unable to find any exception which would eliminate this situation from a conventional application of the governing constitutional mandate. Certainly none is created by the fact that White originally offered the statements for exculpatory purposes since they were ultimately used to incriminate.<sup>47</sup> Nor were they "sweeping claim[s]"<sup>48</sup> on "collateral matters"<sup>49</sup> so "remote from the issue of guilt"<sup>50</sup> as to fall within the principle authorizing impeachment by an otherwise inadmissible statement in limited and guarded circumstances.<sup>51</sup>

We have noted that there was only a general protest on broad constitutional grounds to the admission of any of White's previous testimony at the third trial rather than objection directed specifically to the portions we find inadmissible or to the reasons we have stated.<sup>52</sup> And we are naturally reluctant to reverse the conviction of a defendant three juries have found to be guilty. But neither of these considerations permits us to ignore serious and

<sup>47</sup> See *Miranda v. Arizona*, *supra* note 46, 384 U.S. at 444; *Wong Sun v. United States*, *supra* note 27, 371 U.S. at 487.

<sup>48</sup> *Walder v. United States*, 347 U.S. 62, 65 (1954).

<sup>49</sup> *Tate v. United States*, 109 U.S.App.D.C. 13, 17, 283 F.2d 377, 381 (1960).

<sup>50</sup> *Carter v. United States*, No. 20,091, D.C. Cir., March 2, 1967 at 2. See also *Bailey v. United States*, 117 U.S.App.D.C. 241, 328 F.2d 542, *cert. denied* 377 U.S. 972 (1964); *Barkley v. United States*, 116 U.S.App.D.C. 334, 335-36 n. 1, 323 F.2d 804, 805-6 n. 1 (1963).

<sup>51</sup> See cases cited *supra* notes 48 to 50. See also *Inge v. United States*, 123 U.S.App.D.C. 6, 356 F.2d 345 (1966); *Johnson v. United States*, 120 U.S.App.D.C. 69, 344 F.2d 163 (1964); *Brown v. United States*, 119 U.S.App.D.C. 203, 338 F.2d 543 (1964).

<sup>52</sup> See F.R.Crim.P. 51.

harmful error<sup>53</sup> of constitutional proportions<sup>54</sup> involving the admission of harmful evidence in a capital case.<sup>55</sup>

## V

There is no occasion for extending to Harrison the ruling just made as to White. Harrison was represented by a competent, licensed attorney at the first trial until some point after the evidence was all in.<sup>56</sup> Moreover, none of Harrison's testimony at that trial was used or referred to at the second trial, so nothing therefrom got before the jury at the third. The factual predicates for our disposition as to White are entirely lacking as to Harrison.

White's first-trial statements, however, read to the jury at the third trial, implicated Harrison to the extent we hereinafter mark. On this account, we have pondered the question whether this requires reversal of Harrison's conviction. We have decided, for reasons now to be explained, that it does not.

We might rest our conclusion in this regard upon an application of the principle that evidence not inherently untrustworthy having relevance to the guilt of an accused is not excludable simply because it was elicited in violation of the rights of another.<sup>57</sup> Nonetheless, we have ex-

<sup>53</sup> See *Oliver v. United States*, 118 U.S.App.D.C. 302, 335 F.2d 724, cert. denied 379 U.S. 980 (1964); *Williams v. United States*, 105 U.S.App.D.C. 41, 263 F.2d 487 (1959); *Mills v. United States*, 97 U.S.App.D.C. 131, 228 F.2d 645 (1955); *Robertson v. United States*, 84 U.S.App.D.C. 185, 171 F.2d 345 (1948).

<sup>54</sup> *United States v. Atkinson*, 297 U.S. 157 (1936); *Kohatsu v. United States*, 351 F.2d 898, 901 n. 4 (9th Cir. 1965), cert. denied 384 U.S. 1011 (1966).

<sup>55</sup> F.R.Crim.P. 52(b). See also *Naples v. United States*, 120 U.S.App.D.C. 123, 128, 344 F.2d 508, 513 (1964); *Stewart v. United States*, 101 U.S.App.D.C. 51, 247 F.2d 42 (1957).

<sup>56</sup> See *supra* note 4.

<sup>57</sup> See *Long v. United States*, —, U.S.App.D.C. —, 360 F.2d 829, 834 (1966); *Bowman v. United States*, 350 F.2d 913, 916 (9th Cir. 1965), cert. denied 383 U.S. 950 (1966); 8 Wigmore, Evidence § 2270 (McNaughton rev. 1961); McCormick, Evidence § 73 (1954). Compare *Jones v. United States*, 119 U.S.App.D.C. 284, 342 F.2d 863 (en banc 1964).

panded our investigation broadly enough to satisfy ourselves that White's re-read concessions could not have prejudiced Harrison. White's first-trial statements could have persuaded findings that Harrison transported a shotgun in the Buick and that he took it with him to Brown's house, but these events were not disputed by Harrison. Nor could White's testimony as to whether he was smoking marijuana on the day Brown died have affected detrimentally Harrison's accounts of what occurred at Brown's doorway.

There remains, then, only the query whether Harrison could have been harmed by White's first-trial admission that he was in the vestibule of Brown's house when the shotgun erupted. The jury at the third trial heard the testimony Harrison gave at the second trial that he was alone in the vestibule at the time and in his flight collided with White a short distance outside on the steps. We recognize that this discordance may have had some tendency to undermine Harrison's credibility and to suggest a common scheme to rob, but we assess its proclivities in either respect as trivial. The verdict as to Harrison was sustainable quite apart from any element of conspiracy, to which White's earlier statement could only weakly and tangentially contribute. And Harrison's testimony conflicted seriously with that of others, and mirrored its own internal inconsistencies and gaps at a number of crucial points. We are unwilling to say that its slight incompatibility with White's, viewed in the light of other more serious evidentiary variations and uncertainties, warrants a jury's evaluation of Harrison's criminal responsibility for the fourth time.

We affirm Harrison's conviction. As to White, we reverse and remand for a new trial.

*So ordered.*

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

SEPTEMBER TERM, 1966

Criminal 365-60  
No. 20,280

EDDIE M. HARRISON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Criminal 365-60  
No. 20,281

ORSON G. WHITE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court for the District of Columbia.

Before: Bastian, Senior Circuit Judge, and McGowan and Robinson, Circuit Judges.

JUDGMENT—Filed May 18, 1967

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court:

- (1) that in case No. 20,280 the judgment of conviction as to Eddie M. Harrison is affirmed; and
- (2) that in case No. 20,281 the judgment of conviction as to Orson G. White is reversed, and this is remanded to the District Court for a new trial.

Per Circuit Judge Robinson

Dated: May 18, 1967

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1966

Criminal 365-60  
No. 20,280

EDDIE M. HARRISON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Before: Bazelon, Chief Judge; and Danaher, Burger,  
Wright, McGowan, Tamm, Leventhal and Rob-  
inson, Circuit Judges, in Chambers.

ORDER—Filed August 1, 1967

On consideration of appellant's petition for rehearing  
*en banc*, it is

ORDERED by the court *en banc* that appellant's afore-  
said petition is denied.

*Per Curiam.*

Statement of Chief Judge Bazelon why he believes the  
petition for rehearing *en banc* should be granted.

BAZELON, *Chief Judge*: At a previous trial of defend-  
ants,<sup>1</sup> the Government introduced several of their incrimi-  
nating statements. The defendants testified in their own  
behalf. They were convicted, and on appeal we reversed  
and remanded for a new trial on the ground that the  
statements had been illegally obtained.<sup>2</sup> At the new trial

<sup>1</sup> Defendants' first conviction was vacated because one of them  
was represented at trial by a layman representing himself as an  
attorney. Reference to defendants' previous trial is to their second  
trial.

<sup>2</sup> 123 U.S.App.D.C. 230, 359 F.2d 214 (1965).

now under review the defendants did not testify, but the Government read into the record sections of their testimony at the prior trial. They were again convicted. In this appeal, the court rejected their contention that their testimony was inadmissible since its purpose was to rebut the illegally obtained statements.<sup>3</sup>

Although the court assumes that the defendants would not have testified at the prior trial if their illegally obtained statements had not been introduced, it holds that there was no evidence of governmental duress in the form of "pressure" or "inducement" to compel the defendants to waive their Constitutional right to remain silent. And the court also holds that the prior-trial testimony itself was not the "fruit of the poisonous tree," because the defendants were "individual human personalit[ies] whose attributes of will, perception, memory, and volition interact[ed] to determine what testimony [they would] give." *Smith and Bowden v. United States*, 117 U.S.App.D.C. 1, 324 F.2d 879 (1963).

It seems plain to me, however, that the defendants' decision to testify was compelled by the need to rebut the statements erroneously admitted in evidence. In *Griffin v. California*, 380 U.S. 609 (1965), the Supreme Court held that adverse comment by the court or the prosecutor upon a defendant's failure to testify "cuts down on the [Constitutional] privilege [to remain silent] by making its assertion costly." In the present case, the cost of exercising the privilege was even greater. The erroneously admitted statements left the defendants with a "Hobson's Choice": remain silent and allow the jury to consider the highly damaging statements, or testify and seek to rebut them. Neither time, nor the benefit of counsel, for considering this choice could alleviate the "damned-if-you-do-damned-if-you-don't" alternative.<sup>4</sup>

<sup>3</sup> As to one of the appellants, however, the court reversed the conviction on other grounds. Only appellant Harrison petitions for rehearing en banc.

<sup>4</sup> In *Edmonds v. United States*, 106 U.S.App.D.C. 373, 273 F.2d 108 (1959) (en banc), the introduction of prior-trial testimony was approved. But there the testimony in question was not given in response to evidence illegally obtained and admitted.

Because I think the decision to testify was compelled, it is unnecessary to consider the questions of attenuation reached by the court.<sup>5</sup> I would grant the petition for rehearing *en banc*.<sup>6</sup>

Circuit Judge Wright would grant appellant's petition for rehearing *en banc* and concurs with the statement of Chief Judge Bazelon.

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<sup>5</sup> In any event, *Smith and Borden* and its progeny are inapplicable since they involved witnesses who were not defendants and thus there was no question of testimonial compulsion.

<sup>6</sup> Compare *People v. Polk*, 63 Cal.2d 443, 406 P.2d 641, 47 Cal. Rptr. 1 (1965), *cert. denied*, 384 U.S. 1010 (1966) (Traynor, C.J.).

## SUPREME COURT OF THE UNITED STATES

No. 563 Misc., October Term, 1967

EDDIE M. HARRISON, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for a writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 876 and placed on the summary calendar.

And it is further ordered that the duly certified copy<sup>1</sup> of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

December 4, 1967

SUPREME COURT

FILED

JAN 19 1968

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 876

EDDIE M. HARRISON,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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Appointment of this Court*

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**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1967**

**No. 876**

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**EDDIE M. HARRISON,**

*Petitioner,*

—v.—

**UNITED STATES OF AMERICA.**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**BRIEF FOR THE PETITIONER**

---

**Opinion Below**

The opinion of the Court of Appeals (A. 69) and the opinion on rehearing (A. 88) are not yet reported. Prior opinions (A. 11, 26) are reported at 359 F.2d 214.

**Jurisdiction**

The judgment of the Court of Appeals (A. 87) was entered on May 18, 1967. A petition for rehearing was denied on August 1, 1967 (A. 88). The petition for a writ of cer-

tiorari was filed on August 25, 1967, and was granted on December 4, 1967 (A. 91). The jurisdiction of this Court rests on 28 U.S.C. § 1254.

### **Constitutional Provisions Involved**

#### *Amendment V, Constitution of the United States*

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

#### *Amendment VI, Constitution of the United States*

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

### Questions Presented

1. Whether incriminating testimony extracted from the petitioner by erroneous admission of illegally obtained confessions could be read to the jury at a retrial from which the confessions had been excluded.

2. Whether 45 months' delay of the petitioner's case by Court of Appeals deliberations, and more than seven years' total delay, violated his right to a speedy trial.

### Statement

The petitioner Eddie M. Harrison is serving a life sentence imposed following his third conviction of felony murder in the District Court for the District of Columbia (A. 67). The only significant evidence against him at this trial was his own testimony from a previous trial, which was read to the jury by the prosecutor as part of the Government's case (A. 47). That testimony had been given by the petitioner to rebut confessions used against him in his prior trials but subsequently held inadmissible by the United States Court of Appeals for the District of Columbia Circuit (A. 26). The petitioner did not testify at the third trial, and objected to admission of his testimony from the prior trial on grounds that it was "fruit of a poisonous tree" and its use compelled him to be a witness against himself contrary to the Fifth Amendment to the Constitution of the United States (A. 48, 60-61, 65). At the outset of this trial and on previous occasions he had also objected that this trial, which took place more than six years after his indictment, violated his Sixth Amendment right to a

speedy trial (3 Tr. 3).<sup>1</sup> Following conviction these points were also argued to the United States Court of Appeals for the District of Columbia Circuit, which affirmed his conviction (A. 69) and denied rehearing *en banc* over the dissent of Chief Judge Bazelon and Circuit Judge Wright (A. 88).

The testimony objected to admitted that the petitioner had killed one George "Cider" Brown on March 8, 1960. According to this testimony the petitioner Harrison had gone to Brown's home on that morning to pawn a shotgun. While he was lifting the shotgun to show it to Brown, the latter unexpectedly closed the door, which struck the gun, causing it to discharge, though the petitioner did not know it was loaded (A. 47-52, 55).

This testimony had been given by the petitioner Harrison at his first two trials to rebut confessions, introduced by the Government, which said that Harrison and White had gone to Brown's house (with a third defendant, Joseph R. Sampson) to rob him (2 Tr. 507).<sup>2</sup> Harrison had alleged at these trials that the confessions were false and had been obtained by threats on the part of a police officer while Harrison was being held without counsel, but the trial court

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<sup>1</sup> References to "3 Tr." are to the Reporter's transcript of the third trial which is in the record in this Court. The facts of this trial are also reported in some detail in the opinion below (A. 69). The only portion of this transcript that has been printed in the Joint Appendix is the reading of the former testimony of the petitioner Harrison (A. 47). The written motion sought to be renewed at Tr. 3 (seeking dismissal for violation of the petitioner's right of speedy trial, among other reasons) is in Volume 3 of the record, which does not have numbered pages.

<sup>2</sup> References to "2 Tr." are to the Reporter's transcript of the second trial which is in the record in this Court but has not been printed in the Joint Appendix.

had allowed the confessions to go to the jury for resolution of this claim (2 Tr. 1328 *et seq.*).

These prior trials had both resulted in convictions that were reversed by the Court of Appeals after protracted and unusual proceedings. The first of these reversals was *sua sponte*, the second was by the court sitting *en banc*, and the circumstances of both require examination because they bear importantly upon the petitioner's claim here that he has been denied a speedy trial.

The case first came to the attention of the Court of Appeals in the spring of 1961.<sup>3</sup> At that time it was discovered that a layman, one Daniel Oliver Wendel Holmes Morgan, had been practicing law in the District of Columbia courts under the name of L. A. Harris, a lawyer who had left the jurisdiction sometime previously. Among the cases in which this impostor had appeared as counsel was the first trial in this case, in which the defendants had been found guilty and sentenced to death, which was the mandatory sentence for felony murder in the District of Columbia at that time. Upon discovery of this fact the Court of Appeals remanded the case to the District Court with instructions to accept and grant motions for a new trial. However, the petitioner Harrison and his co-defendants refused to ask for a new trial because they did not want to waive their right to claim former jeopardy if they were tried again. So the District Court sent the case back to the Court of Appeals without acting. There the matter rested while the Court of Appeals pondered what to do

<sup>3</sup> The facts recited in this paragraph appear in the "Findings of Fact, Conclusions of Law and Order" filed October 4, 1961, by Judge Matthews, which is printed at pages 4-8 of the Joint Appendix.

with three youthful, illegally convicted prisoners on death row who refused to seek the new trial to which they were clearly entitled. Eventually, on June 12, 1962, the court ordered a new trial (A. 15).

That second trial took place beginning in April 1963. It was essentially a re-run of the first trial, only this time with real lawyers for all defendants, appointed by the court. Again the Government submitted the defendants' confessions and they took the stand to rebut them, and again they were convicted (A. 47-52; 2 Tr. 507, 1328 *et seq.*). This time they were sentenced to life imprisonment (A. 9), the mandatory death penalty having meanwhile been abolished.

The defendants appealed, and the Court of Appeals eventually reversed their conviction, holding that the confessions used at the first two trials were inadmissible (A. 11, 26; 359 F.2d 214). That appeal was a lengthy one. It was argued on December 18, 1963, and there the matter rested for some 18 months until June 1, 1965, when the court, without having issued an opinion, *sua sponte* ordered rehearing *en banc* on the question of admissibility of one of the confessions involved (A. 12). Six months thereafter, on December 7, 1965, the court issued opinions holding all of the confessions inadmissible (A. 11, 26; 359 F.2d 214).

At this point the case should have been dismissed because there was no significant evidence against the defendants and they had long since been deprived of their right to a speedy trial. However, a third trial was held on May 2, 1966 (3 Tr. 1). This time the trial judge directed acquittal for one of the three, Sampson (3 Tr. 136), but Harrison and White were convicted and again sentenced to life imprisonment (3 Tr. 208).

The trial was an unusual one. There were only three witnesses for the prosecution—a relative who identified the deceased (3 Tr. 7 *et seq.*), a police officer who described the scene of the death (3 Tr. 16 *et seq.*), and a soldier who testified that Harrison had admitted shooting “Cider” Brown, but had not told him the circumstances (3 Tr. 54).

The rest of the trial consisted of the U.S. Attorney’s reading to the jury excerpts from the transcript of the previous trial. He read the coroner’s description of the death wound (3 Tr. 9 *et seq.*) and the testimony of three other witnesses that (1) Harrison, Sampson and White had borrowed a black Buick one evening (3 Tr. 41-42), (2) the next morning Sampson was seen at the same restaurant as the deceased shortly before his death (3 Tr. 48); and with two other persons in a black Buick outside the restaurant (3 Tr. 49-50), and (3) two unidentified men were seen running down the street away from the deceased’s house—one with a shotgun—immediately after a loud blast (3 Tr. 34-36).

At this point in the trial there was no proof of felony murder. The only way such a case could be made was through the confessions of the defendants that had been held inadmissible. However, the prosecutor met this deficiency by reading to the jury the testimony of the defendants at their former trial, given to rebut the inadmissible confessions. While this testimony was exculpatory, it was also damning because it admitted the killing, denying only that the defendants had gone to Brown’s house intending to rob him (A. 47 *et seq.*). The prosecutor argued that this denial was false (3 Tr. 137 *et seq.*) and the jury agreed.

There followed the unsuccessful appeal below, which finally concluded the prosecution on August 1, 1967, more

than seven years after indictment. The pertinent chronology of the case to date is as follows:

- April 19, 1960 —Indictment (A. 1).
- April 21, 1961 —Petitioner sentenced to death following first trial (A. 5).
- July 21, 1961 —Court of Appeals orders remand with leave for petitioner to ask for new trial following discovery of Morgan's identity (A. 4, 7).
- June 12, 1962 —Court of Appeals vacates first conviction and remands (A. 15).
- June 14, 1963 —Petitioner sentenced to life imprisonment following second trial (A. 9-10).
- July 25, 1963 —Counsel appointed for appeal.
- September 16, 1963 —Petitioner's brief submitted to Court of Appeals.
- December 18, 1963 —Case argued to Court of Appeals.
- June 15, 1965 —Case re-argued *en banc* to Court of Appeals on one question (A. 12).
- December 7, 1965 —Court of Appeals reverses second conviction (A. 11, 26; 359 F.2d 214).
- May 13, 1966 —Petitioner sentenced to life imprisonment following third trial (A. 67-68).
- August 23, 1966 —Petitioner's brief filed in the Court of Appeals.

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<sup>1</sup> As to the petitioner Harrison. White's conviction was reversed and he has recently been convicted a fourth time, though that fact is not of record in this case.

November 16, 1966—Case argued to Court of Appeals.

May 18, 1967 —Court of Appeals affirms petitioner's third conviction (A. 69).

June 1, 1967 —Petition for rehearing *en banc* filed.

August 1, 1967 —Petition for rehearing *en banc* denied (A. 88).

August 25, 1967 —Petition for certiorari filed.

December 4, 1967 —Petition for certiorari granted (A. 91).

From the foregoing it will be seen that the total delay involved thus far is approaching eight years, of which 57 months were consumed by the appellate process, including 45 months spent on Court of Appeals deliberations. (Eleven months from July 21, 1961, to June 12, 1962, 24 months from December 18, 1963, to December 7, 1965, eight months from November 16, 1966, to May 18, 1967, and two months from June 1, 1967, to August 1, 1967.)

## Summary of Argument

### I.

When the trial judge allowed the confessions to go to the jury at the second trial, the petitioner Harrison had no real choice but to take the stand to rebut them. The alternative was sure conviction and possible death. Testimony given in such circumstances is not voluntary, and its subsequent use in another trial from which the confessions had been excluded compelled the petitioner to be a witness against himself contrary to his Fifth Amendment privilege to remain silent and put the Government to its burden of

Here the prosecution shouldered no load at all. Eddie Harrison had furnished proof of his guilt in confessions. The Court of Appeals had ruled that proof inadmissible, but that was of no moment. At the previous trial the introduction of the inadmissible confessions had forced Harrison to the witness stand to explain away the confessions, upon pain of certain conviction and possible death. In the words of the *Bram* case, he was "involuntarily impelled to make a statement, when but for the improper influences he would have remained silent." This statement admitted all the elements of the alleged felony murder except intention to rob the deceased, and that the Government was willing to infer. What need was there for the Government in the third trial to shoulder any load since it had available in the transcript of the previous trial the fruits of its prior wrongful use of Harrison's confessions? And why be concerned with the means of obtaining that evidence: after all, wasn't Harrison already twice-convicted and guilty?

To this view there can be but one answer. The prosecutor no less than the police must respect an alleged criminal's Constitutional privilege of silence. See, e.g., *Griffin v. California*, 380 U.S. 609 (1965) (comment on silence not allowed); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (silence not contempt); *Murphy v. Waterfront Comm'n of N.Y.*, 378 U.S. 52 (1964) (testimony compelled by state, and fruits thereof, inadmissible in federal prosecution). The fact that a defendant has been the loser in previous trials condemned as unfair by the Court of Appeals does not make him guilty or deprive him of the presumption of innocence. That presumption exists until overcome by evidence. And that evidence must be fairly and lawfully obtained without violation of the rights of the accused. Otherwise the defendant must go free, whether innocent or guilty.

That must be the result here. The sole evidence of any significance here was obtained from the petitioner's own mouth by the Government's wrongdoing. A conviction so obtained cannot be allowed to stand. As Mr. Justice Frankfurter wrote in a similar context in *Walder v. United States*, 347 U.S. 62, 64-65 (1954):

"The Government cannot violate the Fourth Amendment—in the only way in which the Government can do anything, namely through its agents—and use the fruits of such unlawful conduct to secure a conviction. *Weeks v. United States* (US) *supra*. Nor can the Government make indirect use of such evidence for its case, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 46 L ed 319, 40 S Ct 182, 24 ALR 1426, or support a conviction on evidence obtained through leads from the unlawfully obtained evidence, cf. *Nardone v. United States*, 308 U.S. 338, 84 L ed 307, 60 S Ct 266. All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men."

<sup>6</sup> Cf. *Culombe v. Connecticut*, 367 U.S. 568, 582 (1961); *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961); *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960); *Spano v. New York*, 360 U.S. 315, 320-21 (1959); *Rochin v. California*, 342 U.S. 165, 172-73 (1952); *Watts v. Indiana*, 338 U.S. 40, 54 (1949); *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944); *Lisbena v. California*, 314 U.S. 219, 236 (1941). See also Griswold, *The Fifth Amendment Today*, Harvard University Press, p. 7 (1955):

"I would like to venture the suggestion that the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized. As I have already pointed out, the establishment of the privilege is closely linked historically with the abolition of torture. Now we look upon torture with abhorrence. But torture was once used by honest and conscientious public servants as a means of obtaining in-

proving him guilty by legally obtained evidence apart from statements forced from him.

Use of this testimony at the third trial also violated the principle that the Government may not use the fruits of its own wrongdoing to secure convictions. The Court of Appeals held that the petitioner's confessions were inadmissible because they had been illegally obtained. The testimony given to rebut these confessions was obtained by the wrongful use of these confessions at the second trial. This testimony was therefore "fruit of a poisonous tree," inadmissible in a subsequent federal prosecution.

## II.

This case, now almost eight years old, has been delayed inordinately, largely by the United States Court of Appeals for the District of Columbia Circuit. Following the petitioner's first trial the case was delayed 21 months of which no more than one month was attributable to the petitioner and at least 11 months of which was due to indecision on the part of the court. Following his second trial the appellate process consumed another 32 months, of which two full years were spent solely on Court of Appeals deliberations. The appeal following the third trial added 15 months to the case when it was already more than six years old, and 10 months of this time was spent on court deliberations. Delay of this magnitude far exceeded that necessary to dispose of this case, cannot be squared with the Sixth Amendment's guarantee of speedy trial, and should not be tolerated by this Court in a federal prosecution.

## ARGUMENT

### I.

**The Trial Court Erred When It Compelled the Petitioner to Be a Witness Against Himself by Admitting in Evidence Statements Obtained From Him at a Former Trial as a Result of Illegal Governmental Action.**

The principal witness for the prosecution in this case was the petitioner Eddie Harrison, whose testimony (1) was obtained at a former trial as a direct result of illegal Government action and (2) was admitted in evidence at the trial below over objection that he wished to exercise his Constitutional privilege of not being compelled to be a witness against himself. A conviction so obtained must be reversed. It cannot be squared with the Fifth Amendment or with the principle that the Government is forbidden to use the fruit of its own wrongdoing to secure conviction.

At his second trial Eddie Harrison testified under much the same compulsion as that which gave rise to the earliest assertions of the privilege against self-incrimination in England and the American Colonies: his alternatives were to speak or be sentenced to death or life imprisonment.<sup>5</sup> The Government had introduced into evidence confessions that had led to his being convicted of first degree murder at a prior trial and sentenced to death. He alleged that

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<sup>5</sup> See, *e.g.*, Griswold, *The Fifth Amendment Today*, Harvard University Press, pp. 2-10 (1955); Williams, *One Man's Freedom*, Atheneum, pp. 122-129 (1962); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763 (1935); Lowell, *The Judicial Use of Torture*, Parts I and II, 11 Harv. L. Rev. 220, 290 (1897); Morgan, *The Privilege Against Self Incrimination*, 34 Minn. L. Rev. 1 (1949).

these confessions were false and had been obtained by threats, but Judge Holtzoff had ruled that this was a question for the jury. Hence Harrison's only hope of avoiding a second conviction by those confessions was to take the stand and deny them, telling the jury his version of the killing of "Cider" Brown—that it was an unfortunate accident during an innocent attempt to pawn a shotgun. So he testified.

Such testimony cannot meet the test of voluntariness established in *Bram v. United States*, 168 U.S. 532, 549 (1897), explained by Mr. Justice Brandeis in *Wan v. United States*, 266 U.S. 1, 14-15 (1924), and quoted in *Miranda v. Arizona*, 384 U.S. 436, 462 (1966). The *Bram* opinion said:

"The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent. . . ." 168 U.S. at 549.

To this Mr. Justice Brandeis added:

"In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been

given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. *Bram v. United States*, 168 U.S. 532." 266 U.S. at 14-15.

In extending this standard of voluntariness to extrajudicial interrogation in state proceedings in the *Miranda* case, the Court emphasized the liberal construction to be afforded this privilege against self-incrimination, recalling an earlier admonition that it was "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892). The opinion was at pains "to assure that the exercise of the right will be scrupulously honored . . . ." (384 U.S. at 479), and emphasized that the privilege applies to exculpatory statements as well as outright confessions (384 U.S. at 476) and that waiver of the right would not be presumed, citing *Escobedo v. Illinois*, 378 U.S. 478, 490, n. 14 (1964); *Carnley v. Cochran*, 369 U.S. 506, 516, (1962); *Glasser v. United States*, 315 U.S. 60 (1942); and *Johnson v. Zerbst*, 304 U.S. 458 (1958). 384 U.S. at 475. Further, for explanation of the underlying principle of the privilege the Court cited, among other sources, its recent opinion in *Tehan v. Shott*, 382 U.S. 406 (1966), which said that "the basic purposes that lie behind the privilege against self-incrimination, do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'"

What could be more obnoxious to free men than the course of the Government in this case? Six years after the alleged crime Eddie Harrison was convicted out of his own mouth with testimony wrung from him at two prior unfair trials by use of inadmissible confessions. Neither the Fifth Amendment nor the integrity of the judicial process permits such a result.

So much has been held by the Supreme Court of California in *People v. Polk*, 63 Cal.2d 443, 406 P.2d 641, 47 Cal. Rptr. 1 (1965), *cert. denied*, 384 U.S. 1010 (1966), which involved an issue virtually indistinguishable from the present case. There the defendants had been convicted of first-degree murder, and the jury had fixed the penalty at death on the murder count. On appeal the judgments were reversed for a new penalty trial only. Upon retrial the jury again fixed the penalty for each defendant at death. In dealing with the very issue now before this Court—the admissibility of prior testimony in a subsequent proceeding—Justice Traynor had this to say:

“Defendants’ testimony at the trial on the issue of guilt was read into evidence in the second penalty trial. That testimony was impelled by the erroneous admission of the confessions. . . . Consequently, the testimony was inadmissible at any future trial and should have been excluded. Similarly, defendants’ testimony

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formation about crimes which could not otherwise be disclosed. We want none of that today, I am sure. For a very similar reason, we do not make even the most hardened criminal sign his own death warrant, or dig his own grave, or pull the lever that springs the trap on which he stands. We have through the course of history developed a considerable feeling of the dignity and intrinsic importance of the individual man. Even the evil man is a human being.”

at the second penalty trial will be inadmissible hereafter. That testimony was also impelled, at least in part, by the admission of evidence obtained in violation of Escobedo." 406 P.2d at 645, 47 Cal. Rptr. at 5 (citations omitted).<sup>7</sup>

Thus Justice Traynor dealt squarely with the issue that is the petitioner's principal point of reliance in this case: That testimony compelled by submission of inadmissible evidence cannot be used against a defendant at a subsequent trial. Such a course cannot be reconciled with the Fifth Amendment's prohibition of compulsion nor with the principle that the Government is forbidden to use the fruit of its own wrongdoing to secure convictions. Certainly the opinion below effects no such reconciliation. That opinion disposes of the petitioner's argument on grounds that the Government was not acting in bad faith at the second trial when it obtained testimony as a result of introducing inadmissible evidence (A. 75-76) and that the "appellants were surrounded by the full panoply of legal protections" when their admissions "were rendered in open court . . . induced by an evaluation of the capabilities of the Government's [erroneously admitted] proof to convict" (A. 76). The bracketed words inserted here into the Court of Appeals' opinion are the gist of the argument, and failure to

<sup>7</sup> See also the following California cases presaging the *Polk* holding: *People v. Stockman*, 63 Cal.2d 494, 407 P.2d 277, 47 Cal. Rptr. 365 (1965) (Peters, J.); *People v. Davis*, 62 Cal.2d 791, 402 P.2d 142, 44 Cal. Rptr. 454 (1965); *People v. Guastella*, 234 Cal. App. 2d 635, 44 Cal. Rptr. 678 (Dist. Ct. App. 1965); *People v. Stafford*, 225 Cal. App. 2d 522, 37 Cal. Rptr. 578 (Dist. Ct. App. 1964); *People v. Ibarra*, 60 Cal.2d 460, 286 P.2d 487, 34 Cal. Rptr. 863 (1963); *People v. Garrison*, 189 Cal. App. 2d 549, 11 Cal. Rptr. 398 (Dist. Ct. App. 1961); *People v. Ambrose*, 318 P.2d 181 (Cal. Dist. Ct. App. 1958); *People v. Dixon*, 46 Cal.2d 456, 296 P.2d 557 (1956).

deal with them makes the opinion below largely irrelevant. When the prosecutor used inadmissible evidence, it made no difference whether he was acting in good faith—the damning evidence was not rendered harmless by his motives. *Cf. Townsend v. Sain*, 372 U.S. 293 (1963). And when the trial court erroneously allowed the evidence to come in, it made no difference that the “appellants were surrounded by the full panoply of legal protections”—the panoply was pierced, the defendant was deprived of the very protection that the trial procedure was supposed to provide, and the compulsion to testify was no less because it was exerted in the courtroom in the presence of his counsel.

To this it is no answer, as the opinion below would have it, that “appellants admittedly made a conscious tactical decision to seek acquittal by taking the stand after their in-custody statements had been let in, and the record reflects an appreciable interval for the interaction of mental processes preceding this decision and the testimonial acts themselves” (A. 77). A man facing a firing squad who is told that he has one hour—or one week—to decide whether he will confess to an alleged crime or be shot, also can make a conscious decision to make self-incriminating statements, and also has time to make up his mind. The analysis begins—not ends—in Harrison’s case with his conscious decision to take the stand. The solution to the problem lies in investigating the pressures influencing his choice, and his options.

This Court has long recognized, and recently reaffirmed, that the “choice between the rock and the whirlpool” destroys voluntariness in any meaningful sense.

"It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."<sup>8</sup>

In this case the duress was clear: the petitioner was forced to choose between the "rock" of sure conviction in view of the Government's use of inadmissible confessions and the "whirlpool" of explaining the admittedly "ambiguous circumstances"<sup>9</sup> of his having shot "Cider" Brown. Under these circumstances, Harrison was anything but a willing witness. He testified, but only under great and improper pressure. And the presence of his attorney could do nothing to help him avoid having to make this fateful choice. As

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<sup>8</sup> *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967), quoting *Union Pac. R. Co. v. Public Service Comm'n*, 248 U.S. 67, 70 (1918). See also *Stevens v. Marks*, 383 U.S. 234, 243 (1966); *Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593 (1926). In *Garrity* the Court held that the Fifth Amendment bars admission in the criminal trial of police officers of statements made by them which had been obtained under a state statute compelling them to answer questions or be discharged from employment. The compulsion in *Garrity*—possible loss of employment—seems pale in comparison to the compulsion felt by Petitioner Harrison, sure conviction for life, and possibly a death sentence. The Court outlawed the statements despite the fact that the *Garrity* petitioners were well advised of the consequences of their speaking or remaining silent. Three of the petitioners had counsel at the time they made their admissions, 385 U.S. at 506 (dissenting opinion), and Mr. Justice Douglas noted in his opinion for the Court that "before being questioned each appellant was warned (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office." 385 U.S. at 494.

<sup>9</sup> "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Slochower v. Board of Education*, 350 U.S. 511, 557-58 (1956).

Chief Judge Bazelon wrote in dissenting from denial of rehearing *en banc* below:

"It seems plain to me, however, that the defendants' decision to testify was compelled by the need to rebut the statements erroneously admitted in evidence. In *Griffin v. California*, 380 U.S. 609 (1965), the Supreme Court held that adverse comment by the court or the prosecutor upon a defendant's failure to testify 'cuts down on the [Constitutional] privilege [to remain silent] by making its assertion costly.' In the present case, the cost of exercising the privilege was even greater. The erroneously admitted statements left the defendants with a 'Hobson's Choice': remain silent and allow the jury to consider the highly damaging statements, or testify and seek to rebut them. Neither time, nor the benefit of counsel, for considering this choice could alleviate the 'damned-if-you-do-damned-if-you-don't' alternative" (A. 89):

## II.

**The Petitioner Harrison's Conviction Should Be Reversed and the Eight-Year-Old Indictment Against Him Should Be Dismissed for Violation of His Sixth Amendment Right to a Speedy Trial.**

Perhaps no provision of the Bill of Rights is more ancient or more fundamental to the provision of justice than the Sixth Amendment's command that

"In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ."

As pointed out in the scholarly opinion of Judge Thomsen in the celebrated case of *United States v. Provoo*, 17 F.R.D. 183, 196 (D.C.D. Md.), *aff'd*, 350 U.S. 857 (1955):

"The right to a speedy trial is of long standing and has been jealously guarded over the centuries. Magna Carta states: 'To no one will we sell, to no one deny or delay, right or justice.' This provision was implemented by special writs of jail delivery and later by commissions of general jail delivery, under which special judges cleared the jail twice a year."

The underlying reason for the right, as stated by Sir John Davies three and one-half centuries ago, is that

"... deleyinge the subjects dayes, weakes, and sumtyme termes, racketh the subject lamentably."<sup>10</sup>

In Great Britain this right is sturdily enforced not only at the trial level but also on appeal, with final disposition by the appellate court coming within four to six weeks after trial in criminal cases.<sup>11</sup> In this country appeals are much slower. A fairly recent survey stated that in the United States Court of Appeals the interval between the filing of a notice of appeal and its final disposition varied from a low of 6.3 months in the First Circuit to a high of 11.8 months in the Eighth Circuit. Comparable periods for state courts varied from 5 months to 18, with the lapse between

<sup>10</sup> Quoted in Barnes, *Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber*, 6 *American Journal of Legal History* 221, 222 (1962).

<sup>11</sup> See Holtzoff, *Expeditions, Efficient Justice: Observations on English Appellate Procedure*, 44 *ABA Journal* 221, 222 (1958); Holtzoff, *A Visit to the London Courts: The Administration of Justice in England*, 42 *ABA Journal* 29, 31 (1956).

final argument or submission and the announcement of the decision of the appellate court ranging from 11 days in Nevada to 6 months in New Mexico.<sup>12</sup>

To no small extent a relatively relaxed attitude toward enforcement of the right of speedy trial seems to have been fostered by this Court's frequently quoted pronouncement in *Beavers v. Haubert*, 198 U.S. 77, 87 (1905), that

"The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. It cannot be claimed for one offense and prevent arrest for other offenses; and removal proceedings are but process for arrest,—means of bringing a defendant to trial."

The last sentence above—the holding of the case—is universally omitted when this case is quoted to justify delay in criminal proceedings, but it should not be for it gives to the generalities preceding it a content quite different from the use generally made of them. *Beavers* was seeking to use the Sixth Amendment to preclude his removal to Washington, D. C., for trial on one set of charges before he was tried in New York on other charges and the Court ruled that the right of speedy trial did not require such a course. That is all *Beavers v. Haubert* held and its general language had nothing to do with the question of unnecessary delay in federal proceedings or the amount of delay that might be considered necessary.

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<sup>12</sup> Appellate Delay in Criminal Cases: A Report, Committee on Appellate Delay in Criminal Cases of the Section of Criminal Law of the American Bar Association, 2 American Criminal Law Quarterly 150 (1964).

Neither is the instant case similar to cases such as *United States v. Ewell*, 383 U.S. 116 (1966), and cases therein cited, where delay involved in collateral attack long after conviction has been found not to violate the prisoner's right to a speedy trial. This case involves, rather, the question of how much delay the Sixth Amendment permits in the disposition of cases falling within the normal procedural steps of appeal and re-trial.

Counsel has been unable to find a case in which the Court has addressed itself to this question. But this case demonstrates the need for exercise of the Court's supervisory power to require more scrupulous adherence by the Court of Appeals to the Sixth Amendment's command of a speedy trial. The petitioner Eddie Harrison has been held in jail since March 28, 1960, because of the offense for which he stands accused in this case. During much of this time—some 45 months—his case was before the Court of Appeals awaiting decisions that were too long in coming.

The first period of delay was the twenty-one month lapse between July 21, 1961, when the Court of Appeals made clear by order that Harrison was entitled to a second trial, and April 22, 1963, when that trial actually commenced. In the first opinion in this case, the Court of Appeals attributed this delay to three items, none of which excuses the delay.

The first of these items was the refusal of the prisoners to move the court for a new trial to which the court had said they were entitled when it discovered that they had been represented by an impostor rather than an attorney at the first trial (A. 15; 359 F.2d at 217). The petitioner's

refusal to take this step stemmed from the fact that he did not want to waive his claim of double jeopardy. The court was well aware of that fact and the United States Attorney argued at the time that such a claim could be made by the petitioner if it was not foreclosed by the court (A. 7). The words of Mr. Justice Holmes were apropos in this situation:

"[I]t cannot be imagined that the law would deny a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States." *Kepner v. United States*, 195 U.S. 100, 135 (1904) (dissent).

Yet the court kept Eddie Harrison on death row for eleven months, denying him a speedy trial to which it knew he was entitled, awaiting waiver of his right to be tried but once. That delay was at least unnecessary if not actually oppressive, and certainly should not be charged against Harrison in any assessment of the cause of the delays in this case. Once it was decided that the original conviction was defective, *i.e.*, on July 21, 1961, Harrison "was entitled to a new trial as reasonably soon as circumstances would permit." *United States v. Gunther*, 259 F.2d 173, 174 (D.C. Cir. 1958). That the circumstances here, unusual as they were, permitted a new trial in less than 21 months is manifest.

The second cause of delay mentioned by the Court of Appeals was "a series of defense motions, some purportedly of substance, some procedural, but all contributing to delay" (A. 16; 359 F.2d at 217). Again the court has attributed more delay to the defendants than seems warranted. As the opinion notes, a new trial was granted by the court on June

12, 1962, yet counsel was not appointed for Harrison until October 30, 1962. Hence more than four months' delay cannot rightly be attributed to him. And the motions mentioned in the opinion that can be attributed to him involved little delay: Attorney David sought only a thirty-day continuance to obtain a transcript of the first trial and Harrison's motion for new counsel was granted within that thirty-day period.<sup>13</sup> Thus the petitioner or his court-appointed counsel was directly responsible for only one month of the twenty-one-month delay from the time that the need for a new trial became apparent until the trial began. The remaining delay was attributable to the failure of the judicial processes to function expeditiously.

Nor can this failure be excused by the third item mentioned in the opinion—the fact that Harrison's co-defendants “engaged the impostor” in the first place (A. 16; 359 F.2d at 217). Surely it was the fault of the courts, not the defendants, if fault is to be assessed for the fact that an impostor was allowed to practice law in the District of Columbia courts. At least that must be so as to Harrison, for whom the impostor acted by appointment of the court after his own attorney's death (A. 5).

The subsequent delays in the case, totalling 55 months to date, are nowhere attributed to the petitioner Harrison by the Court of Appeals, nor could they be. The first such delay was the 30 months between sentencing after the second trial and decision of the appeal from that trial. Harrison was sentenced on June 14, 1963, counsel was appointed

<sup>13</sup> Attorney David's motion was filed on January 17, 1963, and new counsel was appointed Harrison on February 8. This motion and order, not printed in the Joint Appendix, are in Volume 2 of the record, which does not have numbered pages.

for him on July 25, 1963, his brief was timely filed on September 16, 1963, and the case was argued on December 18, 1963. There the matter rested for some 18 months, after which the court, without having issued an opinion, ordered rehearing *en banc* on one question. There followed another lapse of six months, after which the court issued its first opinion reversing the convictions because of use of inadmissible confessions. It was argued below that this delay of two years in deciding a case already three years old violated the petitioner's right to a speedy trial, but the opinion brushed this contention aside, indicating that the "appellants' position reflects but scant recognition of the exigencies of appellate review in abnormal cases" (A. 73). This opinion itself was the result of six months' deliberation, from oral argument on November 16, 1966, to opinion issuance on May 18, 1967, and a further two and one-half months were required for preparation and disposition of the petitioner's petition for rehearing, bringing the total time for this case to 87 months before final disposition by the Court of Appeals, of which some 57 months were spent in that court's processes and 45 months on its deliberations.

Delay of this magnitude would not be tolerated by the Court of Appeals if it were occasioned by the District Court or the prosecutor. See, *e.g.*, *Hanrahan v. United States*, 348 F.2d 363 (D.C. Cir. 1965); *Marshall v. United States*, 337 F.2d 119 (D.C. Cir. 1964); *Taylor v. United States*, 238 F.2d 259 (D.C. Cir. 1956); *United States v. McWilliams*, 163 F.2d 695 (D.C. Cir. 1947). Compare, *King v. United States*, 265 F.2d 567 (D.C. Cir.), *cert. denied*, 359 U.S. 998 (1959). Nor should it be tolerated in the Court of Appeals itself. The long delay in this case was unnecessary; it was

not caused by the petitioner; and it denied him the speedy trial that the Constitution guarantees him and all citizens.

### Conclusion

The petitioner's conviction should be reversed, the indictment against him should be dismissed and he should be released from the D. C. Jail forthwith.

Respectfully submitted,

ALFRED V. J. PRATHER  
*Counsel for Petitioner*  
*by Appointment of This Court*

FEB 21 1968

JOHN F. DAVIS, CLERK

No. 876

**In the Supreme Court of the United States**

OCTOBER TERM, 1967

**EDDIE M. HARRISON, PETITIONER**

v.

**UNITED STATES OF AMERICA**

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF FOR THE UNITED STATES**

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# In the Supreme Court of the United States

OCTOBER TERM, 1967

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No. 876

EDDIE M. HARRISON, PETITIONER

v.

UNITED STATES OF AMERICA

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

BRIEF FOR THE UNITED STATES

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## OPINION BELOW

The opinion of the court of appeals (A. 69-86) is not yet reported. The opinions of the court of appeals on an earlier appeal are reported at 359 F. 2d 214, 223 (A. 11-25, 26-46).

## JURISDICTION

The judgment of the court of appeals was entered on May 18, 1967. A petition for rehearing *en banc* was denied on August 1, 1967. The petition for a writ of certiorari was filed on August 25, 1967, and was granted on December 4, 1967 (A91; 389 U.S. 969). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioner's testimony at a prior trial, allegedly given to rebut inculpatory statements introduced at that trial and later held to have been erroneously admitted, was properly read into evidence at the retrial which followed reversal of his conviction.

2. Whether, in the circumstances of this case, petitioner was denied the right to a speedy trial because of allegedly protracted proceedings in the court of appeals.

## STATEMENT

The procedural history and factual background of this case are not in dispute and are set forth in some detail in the opinion of the court of appeals on a prior appeal (A. 11-25) and in the opinion below on the instant appeal (A. 69-86).

1. In October 1960, petitioner and two co-defendants (White and Sampson) were convicted of felony-murder (22 D.C. Code 2401) in the United States District Court for the District of Columbia and, in April 1961, each was sentenced to death, the then-mandatory punishment for their offense (22 D.C. Code 2404 (1961 ed.)). Pending appeal it was learned that the retained "attorney" who had represented petitioner's co-defendants at trial and who had also been appointed to represent petitioner during the post-verdict stages of the case (following the death of his retained counsel), was an imposter and in fact a layman unlawfully practicing law in the District of Columbia. Upon being apprised of these facts, the court of appeals, in July 1961, remanded the case to the district court in

order that it might entertain motions for a new trial. After new counsel filed such motions, they were disaffirmed by petitioner and his co-defendants, presumably in the belief that they might rely on a plea of double jeopardy to prevent retrial. On July 12, 1962, the court of appeals, *sua sponte*, reinstated the appeals, vacated the convictions and ordered a new trial. The district court assigned the case for trial on October 17, 1962, but trial was delayed until April 1963 because of various motions filed by the defense (see A. 15-16).

2. Following this second trial before a jury, petitioner and his co-defendants were again found guilty of felony-murder and were sentenced, upon recommendation of the jury, to life imprisonment.<sup>1</sup>

The government's evidence at the second trial, apart from the confessions of petitioner and his co-defendants, showed, in brief, the following. Shortly after 9:00 a.m. on March 8, 1960, the body of George "Cider" Brown was found just inside the closed front door of his residence. He had been killed by a shotgun blast which had traveled along an approximately horizontal course from outside the front door, through the window glass and shade, and had hit Brown in the face. Brown, who was six feet tall, lay wedged against the front door, which opened inwardly. There was a large amount of money in his

<sup>1</sup> The District of Columbia statute governing the punishment for felony-murder had been amended in the interim to provide for life imprisonment upon a jury recommendation (see 22 D.C. Code 2404 (Supp. IV, 1965)).

pockets (Tr. II, 124-125, 131-132, 229, 231, 584; see A. 13-14, 78).<sup>2</sup>

On the previous night, petitioner and his co-defendants had borrowed a black Buick from a friend (Tr. II, 224-227). One Young, who was with Brown at a restaurant about an hour before his death, testified that he noticed Sampson looking at them in the restaurant. When they left to walk to Brown's car, Sampson followed them out the door. He walked to a parked, black Buick in which two other men were seated (Tr. II, 627-631, 646; see A. 16, 78). A neighbor of Brown testified that she heard a loud noise in the street between 9:00 and 9:30 a.m. on March 8, 1960. She went outside and saw two men. One ran out of Brown's door and put what appeared to be a sawed-off shotgun under his coat; the other was standing outside the door and commenced to run when the blast occurred (Tr. II, 142-146, 169-176). One Valentine testified that he had spoken briefly to petitioner about the death of Brown some time in March 1960, and that petitioner had said that he had killed Brown with a shotgun after Brown had gone "inside of his coat for something, like he might have been going for a gun" (Tr. II, 204-210). In addition, a variety of circumstantial evidence was relied upon by the government (see A. 79-80).

The government also introduced evidence of three confessions of petitioner (two written and one oral)

<sup>2</sup> "Tr. II" refers to the transcript of the second trial, lodged with the clerk of this Court. "Tr. III" will refer to the transcript of petitioner's third trial.

made on March 21, 1960, while he was in police custody, as well as written, post-arrest confessions of Sampson and White. These statements,<sup>3</sup> which were in substantial agreement, related that the three men had been riding around in a borrowed car looking for someone to rob. They followed Brown home from the restaurant where Sampson had observed him. Petitioner and White left the car and went up to the door of Brown's residence. Petitioner carried a shotgun under his coat. After summoning Brown to the door, petitioner (after exchanging a few words) raised the gun. Brown slammed the door, which struck the gun, causing it to fire. Petitioner and White then fled and were picked up shortly thereafter by Sampson in the car (see Tr. II, 490-494—oral statement of petitioner; *id.* at 507-514—written version of same statement; *id.* at 898—written statement of petitioner to jail classification officer; see also *id.* at 817-825—written confession of White; *id.* at 425-431, 460-470—written confessions of Sampson; see also A. 17-24). The introduction of the written statements made by all three defendants was objected to on the ground that they had been obtained during a period of unreasonable detention in violation of *Mallory v. United States*, 354 U.S. 449;<sup>4</sup> the oral admissions, made by petitioner,

<sup>3</sup> The jury was instructed that each confession should be considered as evidence only against the party who made it.

<sup>4</sup> Subsequent statements of all three defendants made to jail classification officers were also introduced by the government, and were objected to on the ground that they were inadmissible under *Killough v. United States*, 336 F. 2d 929 (C.A. D.C.).

were also challenged as violative of the rule of *Harling v. United States*, 295 F. 2d 161 (C.A.D.C.) (*en banc*).<sup>5</sup>

After the statements had been introduced, petitioner took the stand and testified to his own version of the events leading to the death of Brown. He admitted holding the shotgun which killed Brown, but claimed that the firing was accidental and was caused by Brown's slamming the door against the gun as petitioner lifted it for Brown to examine. Petitioner stated that he and the co-defendants had come to Brown's house to pawn the shotgun without any intent to rob him<sup>6</sup> and that they fled when the shotgun went off (Tr. II, 1308, 1330-1332, 1334-1339). White gave basically similar testimony.

On December 7, 1965, the court of appeals reversed all of the convictions, holding that the written statements of petitioner and his co-defendants had been obtained in violation of the *Mallory* rule and the rationale of *Killough v. United States*, 336 F. 2d 929

<sup>5</sup> *Harling* had held that admissions or confessions obtained by police from a juvenile by interrogation while he was subject to the jurisdiction of the Juvenile Court were inadmissible in a later criminal case. The oral statement at issue here was made by petitioner shortly after he had turned eighteen (and was thus no longer a juvenile under District of Columbia law) but one week before the Juvenile Court waived jurisdiction over him. Petitioner was in the District jail on other charges when he made the admissions. He was still seventeen at the time the instant offense was committed, however, and had not been charged with that crime when he made the statement (see A. 19).

<sup>6</sup> Petitioner testified that he knew Brown and had pawned the shotgun and other items to him before (Tr. II, 1339).

(C.A.D.C.), and thus had been improperly admitted over objection at trial (A. 11-25). On the same date the court of appeals, sitting *en banc* and dividing six-to-four, held that petitioner's oral admissions had been improperly admitted under *Harling v. United States*, 295 F. 2d 161 (C.A.D.C.) (A. 26-38).<sup>7</sup>

3. On May 4, 1966, following the third trial, petitioner and White were again convicted of felony-murder and sentenced to life imprisonment on recommendation of the jury.<sup>8</sup> Many of the witnesses who testified at the former trial were either dead or unavailable, and much of the government's evidence therefore consisted of the reading the second-trial testimony of these witnesses to the jury. The government also read into evidence portions of the testimony given by petitioner and White at the second trial.<sup>9</sup> This testimony, while essentially exculpatory in nature, placed petitioner and White at the scene of the crime and indicated that petitioner had been holding the shotgun when it fired, allegedly in an accidental manner, and that the two had fled immediately thereafter (see *supra*, p. 5).<sup>10</sup>

<sup>7</sup> A rehearing *en banc* limited to the effect of *Harling* (see note 5, *supra*, for a discussion of that case) on the admissibility of petitioner's oral statement had been ordered, *sua sponte*, on June 1, 1965 (see A. 12). Both the panel and *en banc* opinions were released together on December 7, 1965.

<sup>8</sup> Sampson was acquitted by the court at the close of the government's case (Tr. III, 136).

<sup>9</sup> The portions of petitioner's testimony read to the jury (Tr. III, 99-129) appear at A. 48-64.

<sup>10</sup> There was ample circumstantial evidence to rebut petitioner's second-trial testimony that he and the co-defendants had not gone to Brown's house for the purpose of robbery (see A. 78-81).

Petitioner and White introduced no evidence in their defense. They objected to the reading of their second-trial testimony at this third trial on the ground that it was induced by the introduction of their inadmissible confessions at the second trial, contending that the admission of this testimony violated their Fifth Amendment right to remain silent (Tr. III, 130-131). They also asserted that their Sixth Amendment right to a speedy trial had been denied, principally as a result of the protracted review in the court of appeals following their second trial. The court of appeals rejected these arguments and affirmed petitioner's conviction (A. 69-86).<sup>11</sup> A rehearing *en banc* was denied, Judges Bazelon and Wright dissenting on the Fifth Amendment issue (A. 88-90).

#### SUMMARY OF ARGUMENT

A criminal defendant has a right not to testify at all, but if he chooses to testify he cannot generally give testimony for which he is not responsible. Indeed, only in rare instances is a witness's testimony unavailable for use in a subsequent criminal proceeding. Petitioner's contention that his second-trial testimony was improperly used by the government in his third trial does not come within the scope of any recognized exception to the fundamental principle that a witness

<sup>11</sup> White's conviction was reversed on the ground (not pertinent here) that portions of his testimony read to the jury included statements he made at his first trial when he had not been represented by a bona-fide attorney. On December 4, 1967, White was again convicted by a jury of felony-murder and sentenced to life imprisonment.

must be held accountable for his testimony. His testimony was not "compelled" within the meaning of the Fifth Amendment since he could have adequately preserved his constitutional challenge to the propriety of introducing his statements which were later held on appeal to have been illegally obtained. Any compulsion which petitioner might have felt to take the stand stemmed from the strength of the government's case, not from any requirement making his testifying the only way to raise or preserve a legal issue. His decision to testify involved purposeful trial strategy which he should not be allowed to renounce because his objections to the introduction of his statements were subsequently vindicated on appeal.

Nor was petitioner's second-trial testimony sufficiently the product of the introduction of his statements so as to be excludable at his third trial under the "fruit of the poisonous tree" doctrine. That testimony, like the testimony of any live witness, as distinguished from inanimate evidence, was given as a result of his decision to take the stand in an effort to undermine the government's strong case against him. Petitioner has made no factual showing causally connecting his testimony with the introduction of the illegally obtained statements. Indeed, the record shows that petitioner's counsel initially decided not to call petitioner as a witness, but changed his mind after assessing the probable effect of the government's case on the jury. Accordingly, the court of appeals correctly concluded that petitioner's testimony was not

tainted by the prior illegality in obtaining his statements.

An exclusionary rule should not in any event be applied in circumstances involving innocent prosecutorial or judicial error in introducing or admitting evidence at trial. Such a rule would serve no proper purpose of deterrence in such circumstances. This is particularly so where, as here, the errors occurred in a complex factual and legal situation and where no clear governmental overreaching in obtaining evidence was involved.

Petitioner's further contention that he was denied the right to a speedy trial, principally because of allegedly protracted proceedings in the court of appeals, is without merit. Although there is no categorical test for assaying the validity of a denial of a speedy trial claim, one essential element of such claim is a showing that some material prejudice has resulted. Petitioner has made no such showing here, and this provides a sufficient ground for rejecting this contention. Moreover, virtually all of the period of alleged delay resulted either from petitioner's or his attorney's actions or was necessary to ensure careful and considered appellate review of the unusual issues presented in a capital case. Applying the basic approach of orderly expedition and not mere speed, petitioner has no reason to complain about the amount of time devoted by the court of appeals to a painstaking analysis of his legal claims.

## ARGUMENT

## I

PETITIONER'S SECOND-TRIAL TESTIMONY WAS NOT "COMPELLED" WITHIN THE MEANING OF THE FIFTH AMENDMENT AND WAS THUS PROPERLY AVAILABLE FOR USE BY THE GOVERNMENT AT HIS THIRD TRIAL.

A. THERE WAS NO NEED FOR PETITIONER TO TESTIFY IN ORDER TO CHALLENGE EFFECTIVELY THE INTRODUCTION BY THE GOVERNMENT OF HIS ILLEGALLY OBTAINED CONFESSIONS; HE COULD HAVE RELIED ON HIS OBJECTIONS, SUBSEQUENTLY VINDICATED ON APPEAL, TO THE ADMISSIBILITY OF HIS INCULPATORY STATEMENTS

Petitioner's contentions with regard to the government's use of his second-trial testimony at the third trial divide themselves into two more or less distinct claims. Petitioner argues (1) that since he was allegedly "compelled" to take the stand to rebut certain admissions later held on appeal to have been illegally obtained, his Fifth Amendment right of silence was violated by the introduction of that testimony against him upon retrial. He further asserts (2) that since his testimony was allegedly given in response to those illegally obtained statements, that testimony was in any event inadmissible under the "fruit of the poisonous tree" doctrine. While these contentions are to a certain extent intertwined and overlap one another, they are sufficiently separate, in our view, to warrant independent treatment. Moreover, we regard the "fruit of the poisonous tree" rationale as inappropriate here in any event; in our view, there is no

justification for applying an exclusionary rule to testimony of a defendant allegedly given in response to innocent prosecutorial or judicial error relating to the admissibility of evidence at trial as compared with evidence directly secured by law enforcement officers through illegal activity.

We start with the proposition that, save for rare instances, witnesses who give testimony in a criminal case in a federal court are not entitled to object to the use of that testimony by the government in a subsequent criminal proceeding. See, e.g., *Walder v. United States*, 347 U.S. 62; *Edmonds v. United States*, 273 F. 2d 108 (C.A.D.C.) (*en banc*), certiorari denied, 362 U.S. 977; *Ayres v. United States*, 193 F. 2d 739 (C.A. 5). Indeed, it has long been accepted that no individual, not even a defendant in a criminal case, has any claim or right, constitutional or otherwise, to testify irresponsibly. He does have a right not to testify at all. If he exercises that right, the fact that he does not testify may not be used against him. If, however, he chooses to testify, for whatever reason, he has no right to give testimony for which he is not responsible, for our process of administration of criminal justice presupposes that testimony is seriously given and is therefore reliable. This principle derives its justification from the fact that our system of justice has traditionally been based in large part upon the production of evidence in which the testimony of witnesses necessarily play a significant role.

A criminal defendant's decision to take the stand involves a variety of risks, only one of which is that his testimony might be used against him in a subsequent criminal proceeding. One who testifies can be subjected to cross-examination, during the course of which he might make some damaging admissions. One who takes the stand can be impeached through the introduction of prior inconsistent statements. One who testifies can be shown to have perjured himself, or to have given testimony which conflicts with testimony given in a later proceeding. The availability of the witness's testimony in such circumstances derives directly from the premise that persons can be held responsible for what they say when they take the stand. And reliance on a witness's responsibility for his testimony, as well as the need to be able to test his veracity by a variety of means, is essential to the proper functioning of our judicial system.

In light of these considerations, exceptions to the basic principle that a defendant's testimony may be used against him are few. They have been confined to situations where the defendant's testimony has been impelled by the knowledge that he will suffer a significant detriment in the evidence of a "choice" of silence. Thus, in *Garrity v. New Jersey*, 385 U.S. 493, a majority of this Court held that testimony of police officers at an investigatory hearing could not be introduced against them at their subsequent trial, where the officers were subject to loss of their jobs, under a State statute, for failure to

testify at the hearing.<sup>12</sup> And in *Boyd v. United States*, 116 U.S. 616, a statute requiring production of a document on penalty of forfeiture of certain goods at issue in an action was struck down on similar grounds. But cf. *McCarthy v. Arndstein*, 266 U.S. 34, 41-42.

It is apparent, however, that the instant case is unlike either *Boyd* or *Garrity* and does not come within the scope of any recognized exception to the fundamental principle that a defendant must be held accountable for his testimony. Here there was no significant detriment which petitioner would suffer through a failure to become a witness at his second trial. Petitioner, by relying on his objections to the introduction of his inculpatory statements, could have adequately preserved his constitutional challenge to the propriety of that evidence and could thus have insured a retrial by prevailing, if his objections were well founded, on appeal. Any compulsion which petitioner might have felt to testify in his own defense was thus in no way dictated by any requirement making his testifying the only way to raise a legal issue.<sup>13</sup>

<sup>12</sup> For cases involving the somewhat different problem of the use that can be made by the prosecution of a party's prior invocation of his privilege not to testify, compare *Spevack v. Klein*, 385 U.S. 511, *Griffin v. California*, 380 U.S. 609, *Stochower v. Board of Education*, 350 U.S. 551, and *Stewart v. United States*, 366 U.S. 1, with *Walder v. United States*, 347 U.S. 62, and *Raffel v. United States*, 271 U.S. 494.

<sup>13</sup> Moreover, in situations such as that involved in *Simmons and Garrett v. United States*, No. 55, this Term, argued January 15, 1968 (see 371 F. 2d 296, 298, 299 (C.A. 7) for the decision below), the lower federal courts have unanimously regarded such a choice as a permissible one to impose upon a criminal defendant, holding that his testimony given at a hearing on a pre-trial motion to suppress evidence, allegedly necessary to

If there was any actual compulsion, it derived solely from the impact which petitioner believed the government's case—if unchallenged by his own testimony—would have on the jury. Even assuming something which is essentially beyond proof—that petitioner was placed in the position of having to choose between relying on his objections and taking the witness stand to try to reduce the “certainty” (see Pet. Br. 14) of an adverse verdict<sup>14</sup>—that choice did not in any proper sense “compel” him to testify within the meaning of the Fifth Amendment.

Petitioner was in the same position as any defendant in a criminal trial who is confronted by a strong prosecution case.<sup>15</sup> As an accused in a criminal case petitioner had, as the court of appeals noted, “an absolute privilege to stay silent and, as well, the professional advice of competent counsel as to whether the privilege is to be renounced” (A. 77). He “made a conscious tactical decision to seek acquittal by establish his standing to assert a claim of violation of Fourth Amendment rights by the government in securing certain evidence, may be introduced against him at the trial, although he elects not to take the stand before the jury. *E.g., Heller v. United States*, 57 F. 2d 627 (C.A. 7), certiorari denied, 286 U.S. 567; *United States v. Taylor*, 326 F. 2d 70 (U.A. 4), certiorari denied, 377 U.S. 931.

<sup>14</sup> The jury, depending upon its assessment of petitioner's demeanor and general credibility, could well have convicted petitioner precisely *because of* his own testimony, but that is a risk that petitioner, like any other criminal defendant, necessarily took in deciding to take the stand.

<sup>15</sup> Many criminal defendants may view themselves as having “no real choice” (Pet. Br. 9) but to take the stand when confronted with a strong prosecution case. Yet, it could hardly be maintained that such persons had been “compelled” to testify in violation of the Fifth Amendment in all such circumstances.

in the stand after [his] in-custody statements had been let in \* \* \*” (*ibid.*).<sup>16</sup> His decision whether to testify or not was thus a matter of purposeful trial strategy which he ought not to be allowed to renounce simply because his legal claim—the raising of which in no way depended upon his taking the stand—was vindicated on appeal.<sup>17</sup> As the court of appeals pointed

<sup>16</sup> An apt analogy was suggested by the court below when it pointed out that “had [petitioner] voluntarily spoken extrajudicially” his statements would have been admissible against him “even if the remarks had attempted exoneration in the face of strong or even overwhelming indicia of guilt” (A. 76). It seemed incongruous to the court that such statements could nonetheless be thought inadmissible if “made at a judicial trial, where [petitioner was] surrounded by the full panoply of legal protections,” for, in the court’s view, his “second-trial account of the fatal episode lost none of [its] qualit[y] of admissibility merely because [it was] rendered in open court or [was] induced by an evaluation of the capabilities of the Government’s proof to convict” (*ibid.*).

<sup>17</sup> In this respect the situation here differs significantly from that in *Griffin v. California*, 380 U.S. 609, where the Court concluded that adverse comment on a defendant’s failure to testify violated his privilege against self-incrimination. Here there was no adverse comment on petitioner’s failure to take the stand, for he in fact testified. That testimony was in no proper sense “compelled” since he could have preserved his objections to admissibility by remaining silent. Conversely, there is no way to avoid the prejudicial effect of an adverse comment on failing to testify except by taking the stand. That was the precise vice found by this Court in *Griffin*. Moreover, petitioner’s determination not to take the stand in the instant trial, unlike in *Griffin*, did not result in a “cut[ting] down on the privilege by making its assertion costly” (380 U.S. at 614); nor was petitioner subjected to “a penalty imposed by courts for exercising a constitutional privilege” (*ibid.*). Petitioner was in no sense “penalized” by the introduction of his second-trial testimony, which we must assume was responsibly given. Nor was his assertion of the privilege at the instant trial made “costly”

out in rejecting petitioner's argument in this regard (A. 75):

Our federal system bestows upon an accused the choice of testifying or not, and permits what he says from the witness stand to be used against him if not elicited coercively. \* \* \* Here, unlike situations where duress of some sort has been found, the Government exerted no pressure, offered no inducement and imposed no improper conditions upon [petitioner's] right to muteness. There was uninhibited access to counsel, and so far as we can perceive, complete awareness of legal rights. We have been referred to no case, and our own intensive research has located none, holding that the strength of the Government's case is itself a vitiating form of testimonial compulsion.

In short, petitioner was in no proper sense "compelled" to testify at his second trial. Having decided to testify, he can be held to the ordinary consequences which flow from taking the stand. He is presumed to have testified responsibly, and his testimony, like the statements of any other unavailable witness, can be introduced by the government in a subsequent criminal proceeding.

B. PETITIONER'S DECISION TO TESTIFY WAS NOT THE PRODUCT OF THE INTRODUCTION BY THE GOVERNMENT OF HIS INADMISSIBLE STATEMENTS; USE OF HIS TESTIMONY BY THE GOVERNMENT UPON RETRIAL WAS THEREFORE NOT PRECLUDED BY THE "FRUIT OF THE POISONOUS TREE" DOCTRINE

Petitioner contends that his second-trial testimony was sufficiently the product of government illegality—

through the introduction of his earlier testimony, unless we assume that he testified inaccurately or untruthfully on that occasion.

*i.e.*, the introduction of the statements later held on appeal to have been illegally obtained and thus inadmissible—so as to be excludable as “fruit of the poisonous tree.” *E.g.*, *Nardone v. United States*, 308 U.S. 338, 341. Assuming, *arguendo*, the propriety of applying the “fruit of the poisonous tree” rationale to the facts of this case,<sup>18</sup> the contention must be judged within the framework of the test laid down in *Wong Sun v. United States*, 371 U.S. 471,<sup>19</sup> where this Court stated (*id.* at 487-488):

We need not hold that all evidence is “fruit of the poisonous tree” simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. *Maguire, Evidence of Guilt*, 221 (1959).”

Thus, the pertinent standard is not a simple “but for” test; rather, the question in each case is whether the evidence sought to be introduced has been derived from a sufficiently independent source so that it can

<sup>18</sup> As indicated previously (*supra*, pp. 11-12), we challenge the applicability of that doctrine in the instant circumstances, for the reasons discussed at a later point (see *infra*, pp. 24-27).

<sup>19</sup> Parenthetically, if *Wong Sun*’s post-arraignment voluntary confession was not a “fruit” of his unlawful arrest two days before, but the result of his independent choice, as this Court held (*Wong Sun, supra*, 371 U.S. at 491), petitioner’s second-trial testimony, given at a place and time far removed from any actual, operative illegality, was clearly not come by through the exploitation of such illegality, but was the result of his own unfettered will.

properly be concluded that the effect of the illegality had "become so attenuated as to dissipate the taint" (*Wong Sun, supra*, 371 U.S. at 491, quoting from *Nardone, supra*, 308 U.S. at 341; see also *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392). Application of this standard requires in each case a careful examination of the surrounding circumstances.

Petitioner's precise claim is that the introduction of extra-judicial statements later held to have been illegally obtained so tainted the testimony he gave, allegedly to rebut these statements, that that testimony was a "fruit" of the prior illegality and accordingly inadmissible upon retrial. In this respect, the contention is not substantially different from an objection to the live testimony of any witness on the ground that his testimony was tainted by some prior illegality, although here the live testimony was given at one trial and read into evidence at a later trial. Thus, the context for evaluating petitioner's claim that the evidence challenged was inadmissible "fruit" is that of actual testimony given by a live witness during a trial and under oath. We recognize that this Court has not had occasion to consider whether there are circumstances in which taint might be found in the context of a challenge to the admissibility of live witness testimony. But see *Goldstein v. United States*, 316 U.S. 114; cf. also *United States v. Bayer*, 331 U.S. 532, 539-541. But the federal courts which have reached this question have uniformly recognized the increased burden which the party seeking to exclude such testimony must bear, in light of the fact that human beings, unlike inanimate evidence, are capable

of independent choice and thought. As the court stated in *Smith and Bowden v. United States*, 324 F. 2d 879, 881 (C.A.D.C.), certiorari denied, 377 U.S. 954:

The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual whose attributes of will, perception, memory and volition interact to determine what testimony he will give.<sup>20</sup>

Focus upon "attributes of will, perception, memory and volition" seems particularly appropriate in cases like the present one where the witness whose testimony is sought to be excluded is a *defendant* whose decision to testify will ordinarily be the product, at least in great part, of his own, or his counsel's, trial strategy. In cases such as this, where it is claimed that a defendant testified *because of* the introduction in the government's case of certain illegally obtained evidence, it will generally prove extremely difficult, if not impossible, to isolate the various reasons and motives upon which defense counsel's decision to have the defendant take the stand were based.

<sup>20</sup> Compare also, applying the above observations but reaching divergent conclusions on different facts, *Edwards v. United States*, 330 F. 2d 849 (C.A.D.C.), and *Brown v. United States*, 375 F. 2d 310 (C.A.D.C.), certiorari denied, 388 U.S. 915, with *Smith and Anderson v. United States*, 344 F. 2d 545 (C.A.D.C.), and *United States v. Tane*, 329 F. 2d 848 (C.A. 2.). In contrast, the courts in the California cases cited by petitioner (Pet. Br. 16-17), e.g., *People v. Polk*, 63 Cal. 2d 443, 406 P. 2d 641, certiorari denied, 384 U.S. 1010, seem not to have considered this point in reaching their decisions.

Petitioner, beyond bare assertions that taking the stand was his "only hope of avoiding \* \* \* conviction" (Pet. Br. 12) and that his testimony was "wrung from him" (Pet. Br. 16), has not attempted to make a factual showing which causally connects his testimony with the introduction of the illegally obtained admissions. That inquiry is, however, aided in this case by the existence of an unusual record casting considerable light on defense counsel's reasons for calling petitioner as a witness in his own behalf. Here the record shows that petitioner's counsel, in his opening statement, informed the jury that petitioner would not testify. Counsel stated that his defense would be "to so destroy by cross-examination or the presentation of [contradictory] witnesses \* \* \* the testimony given by Government witnesses, that you will decide that it is so ineffective and perhaps untrue or unworthy of credibility that you will throw it out" (Tr. II, 77). Following the close of the government's case, petitioner's counsel advised the judge that "the defendant may, through counsel, \* \* \* change his mind about [testifying]" (Tr. II, 957). The trial court permitted petitioner, with his co-defendants' consent, to be called last to present his case rather than first. Petitioner thereafter did in fact take the stand (Tr. II, 1291-1370) and gave, *inter alia*, the testimony now in question.

Defense counsel later indicated that the reason which led him to alter his decision not to put petitioner on the stand was his own feeling that his

original trial strategy of destroying the credibility of the government's witnesses had not succeeded. In a comment to the jury at the beginning of his closing argument, he stated (Tr. II, 1566-1567):

At the outset in my opening I told you that my defense on behalf of Harrison would be that I would bring about the destruction of the Government's case; that is, through its witnesses by proving that they would not testify truthfully. And, further, that I would not put the defendant Harrison on the stand.

I think you will agree that in both instances I think I have not done either. Mr. Harrison did take the stand and I did not bring about the kind of destruction which I indicated to you I would, of the testimony of the witnesses of the Government \* \* \*.

It seems apparent that defense counsel's decision to have petitioner take the stand was not motivated in any direct causal sense by the government's introduction of his statements. Counsel must have been aware from his trial preparations of the existence of those confessions and their intended use by the government. But he indicated at the outset of the trial that he had made a deliberate decision not to have petitioner testify *notwithstanding* the contemplated use of those confessions. Instead, he initially determined that he would challenge the credibility of all the government witnesses through cross-examination. Much of the government's testimony would naturally center around the circumstances under which the confessions were made, and counsel doubtless thought he could cast sufficient doubt on the credibility of the govern-

ment's witnesses in this regard to give his client a reasonable chance of acquittal. At the close of the government's case, however, defense counsel obviously realized, and indeed candidly admitted later, that he had not succeeded in undermining the credibility of the government's witnesses to the extent he anticipated at the outset of the trial. He then reevaluated his strategy and determined to call petitioner as a witness, in part at least to bolster a contention that his statements had been obtained involuntarily. This conclusion is strongly suggested by the fact that, during petitioner's direct examination, counsel took care to question him not only as to his version of the events leading to the death of "Cider" Brown (thus challenging the content of the confessions), but also as to the circumstances under which the statements were made (see Pet. Br. 4-5, 11-12). Petitioner testified that he had been beaten and threatened prior to signing the inculpatory statements (Tr. II, 1324-1329), and defense counsel utilized that testimony to make a lengthy closing argument to the jury on the issue of voluntariness (Tr. II, 1574-1582).

On this record, the court of appeals' conclusion that petitioner's testimony was not tainted by the introduction against him of his unlawfully obtained statements was clearly correct. As the court noted (A. 77-78):

[Petitioner] admittedly made a conscious tactical decision to seek acquittal by taking the stand after [his] in-custody statements had been let in, and the record reflects an appreciable interval for interaction of mental processes preceding this decision and the testimonial acts

themselves. It would be rash to assume that [petitioner] facing the death penalty upon conviction would be unduly influenced to testify favorably to the Government by either the introduction of the prior confessions or their procurement three years previously. In the circumstances here, we deem the relationship between the erroneous admission of [petitioner's] statements and [his] testimony at the second trial to be "so attenuated as to dissipate the taint." [*Nardone v. United States*, 308 U.S. 338, 341].

Moreover, we cannot accept petitioner's implicit assumption that some kind of exclusionary rule should apply to a defendant's testimony given in response to evidence admitted through innocent prosecutorial or judicial error. Considering its historical evolution and its traditional function as a prophylactic device, an exclusionary rule would serve no proper role in such circumstances. The ordinary justification for application of an exclusionary rule (of which the "fruit of the poisonous tree" doctrine is but an offshoot) is that it serves to deter governmental illegality in procuring evidence "by removing the incentive to disregard" an individual's constitutional rights.<sup>21</sup> That purpose would not be significantly aided by the exclusion of evidence allegedly given in response to innocent prosecutorial or judicial mistake. There is no basis for believing that prosecutors would attempt to

<sup>21</sup> *Elkins v. United States*, 364 U.S. 206, 217; see *Mapp v. Ohio*, 367 U.S. 643, 656-657; see also *Miranda v. Arizona*, 384 U.S. 436; *Mallory v. United States*, 354 U.S. 449; *Massachusetts v. Painten*, No. 37, this Term, decided January 15, 1968 (Mr. Justice White, dissenting).

elicit a defendant's testimony by intentionally seeking admission of damaging, illegally obtained evidence or that district judges would knowingly permit the introduction of such evidence. Here, as the court of appeals noted (A. 76), there is "not even a whisper that the Government, in utilizing the statements at the second trial, was motivated by a purpose to elicit a testimonial response from appellants." Nor can one regard the trial court's error, particularly with respect to admitting petitioner's initial, oral admissions, as egregious. Indeed, before the court of appeals *en banc* found that statement inadmissible, in a 6-4 decision (see A. 26-46), a panel of that court had held that that evidence had been properly admitted at trial (A. 22-23). And the ground on which the *en banc* determination of inadmissibility rested involved a rather technical and quite unanticipated construction of the court of appeals' decision in *Harling v. United States*, 293 F. 2d 161 (see *supra*, p. 7).<sup>22</sup> In such a complex factual and legal situation it can only be concluded that the errors committed in introducing and admitting this evidence were wholly innocent and quite explicable. In such a context, a concept of deterrence obviously has no place.

Although it was ultimately determined that petitioner's statements had been obtained illegally, the effects of that illegality were erased by the reversal of petitioner's conviction on appeal and the grant of a new

<sup>22</sup> It should be noted that the panel which initially passed on the relevance of *Harling* stated that that case "requires no such absurd result, for neither its rationale nor the circumstances there considered can have application here" (A. 23; see also the dissent to the *en banc* decision, A. 38-46).

trial from which the illegally obtained statements were excluded. Thus, the second-trial "misconduct" to which petitioner's testimony allegedly related involved merely the innocent errors of the prosecutor in introducing those statements and of the trial judge in admitting them<sup>23</sup>—not the typical sort of police illegality which ordinarily triggers application of an exclusionary rule. This is simply not a case involving statements made in direct response to clear governmental overreaching, or evidence seized as a result of a demonstrable intrusion on constitutionally protected rights. Rather, the instant case is analogous to one where the prosecutor innocently uses a witness who gives testimony later discovered to be perjured, to which the defendant has responded; or where, by reason of innocent error, the prior criminal record of the government's complaining witness is not discovered until after the trial, and the defendant has taken the stand to rebut that witness's testimony. Cf. *United States v. Gordon*, 246 F. Supp. 522 (D.D.C.); *Kretske v. United States*, 220 F. 2d 785 (C.A. 7), reversed *per curiam*, in consideration of the government's confession of error, 350 U.S. 807. In these instances, an exclusionary rule predicated upon a

<sup>23</sup> Even if it is assumed, *arguendo*, that petitioner's testimony was in some respects induced by the introduction and admission of his inculpatory statements, defense counsel's tactical decision to have petitioner take the stand—which proved unnecessary since the court of appeals later held the statements to have been illegally obtained—was predicated on the very same error of law ultimately determined to have been made by the prosecutor and trial court regarding the admissibility of this evidence. Thus, the government and the trial court are no more culpable in this regard than petitioner himself.

concept of deterrence would obviously be inappropriate and ineffective.

Nor is the present case an apt one for application of the precept that the doer of wrong shall not profit from his action. Here there was no deliberate wrongdoing. Although the government, under the approach we advocate, can utilize a defendant's testimony elicited in response to evidence erroneously admitted, that result is justified by the need of our system of justice to rely on the fact that testimony is given responsibly (see *supra*, pp. 12-13). Only when testimony can be shown to have been actually "compelled" could a witness—whether a criminal defendant or not—be said to have a right to give testimony for which he is not responsible—i.e., which may not be used against him in a subsequent criminal proceeding. Here, as previously discussed, it is clear that there was no compulsion dictating petitioner's testimony since he could have relied on his objections to the admissibility of his confessions without ultimately incurring any detriment. Once the lack of compulsion for petitioner to testify becomes apparent, the following language from *Raffel v. United States*, 271 U.S. 494, 497, 499, takes on a particular and conclusive pertinence:

[The defendant's] waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will \* \* \*

\* \* \* \* \*

The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness: \* \* \*

## II

THE PERIODS OF DELAY OF WHICH PETITIONER COMPLAINS RESULTED IN NO PREJUDICE TO HIS ABILITY TO CONDUCT HIS DEFENSE AND WERE IN ANY EVENT EITHER HIS OWN RESPONSIBILITY OR AN INCIDENT OF CONSIDERED APPELLATE REVIEW OF THE UNUSUAL QUESTIONS PRESENTED IN THIS CASE; THERE WAS THEREFORE NO DENIAL OF THE RIGHT TO A SPEEDY TRIAL.

Petitioner contends that he was denied the right to a speedy trial, largely through allegedly protracted proceedings in the court of appeals. His claim is in some respects a novel one,<sup>24</sup> since his primary focus is upon the time taken for appellate review (as a result of which he prevailed) and not upon delay in bringing him to trial. In any event, petitioner's claim, whether assessed under the Sixth Amendment or the Due Process Clause of the Fifth Amendment, is essentially without merit.

There is of course no categorical test for appraising a claim that the right to a speedy trial has been denied. As this Court stated in *Pollard v. United States*, 352 U.S. 354, 361, "Whether delay in completing a prosecution \* \* \* amounts to an unconstitutional deprivation of rights depends upon the circumstances." This is so, of course, because the nature of the subject matter, with its virtually unlimited possible variants, does not lend itself to the articulation of a precise standard. See *Beavers v. Haubert*, 198 U.S. 77, 87; *Hedgepeth v. United States*, 364 F. 2d 684, 687 (C.A.D.C.).

<sup>24</sup> We have found no case in which a similar claim of denial of the right to a speedy trial based upon alleged appellate court delay has been made.

However, one essential element is that the person claiming denial of the right to a speedy trial show that some material prejudice has resulted. See, e.g., *United States v. Ewell*, 383 U.S. 116, 122; *Tynan v. United States*, 376 F. 2d 761 (C.A.D.C.), certiorari denied, 389 U.S. 845; *Mann v. United States*, 304 F. 2d 394, (C.A.D.C.), certiorari denied, 371 U.S. 896. Here petitioner asserts no prejudice resulting from the periods of delay about which he complains; nor, as the court of appeals found (A. 74; see A. 72, n. 13),<sup>25</sup> is any apparent from the face of the record. His failure to make any showing that his ability to conduct his defense was impaired by the allegedly unreasonable delay accordingly precludes a finding that his constitutional rights were infringed. *United States v. Ewell*, *supra*; see *King v. United States*, 265 F. 2d 567 (C.A. D.C.) (*en banc*), certiorari denied, 359 U.S. 998. The delays, for the most part, were either the consequence of his own or his attorney's actions, for which he is responsible, or were necessary to ensure careful and considered appellate review of the complex and unusual issues presented by this case.

1. *The post-first trial period of delay.* Following the revelation of the "Morgan masquerade" (A. 14),

<sup>25</sup> As the court of appeals indicated (A. 74), the "only concrete suggestion" made regarding possible prejudice allegedly resulting from the duration of appellate review was "that the absence of some of the Government's witnesses and the resulting need to read their prior testimony to the jury precluded additional cross-examination." But, as the court below pointed out (*ibid.*), petitioner "had, and utilized, the opportunity to question those witnesses fully during the second trial, and at the third trial [was] free to present to the jury the prior cross-examination but elected not to do so."

while petitioner's first-trial conviction was pending in the court of appeals, that court, on July 21, 1961, issued an order requiring the district court to award a new trial to petitioner and his co-defendants upon their filing of appropriate motions within ten days. Counsel for all of the defendants filed such motions, but at a hearing on September 14, 1961, informed the district judge that the motions had been filed without the consent of the defendants, who wished to disaffirm them, apparently because of a belief that they might rely on a claim of double jeopardy. On October 4, 1961, the district judge ordered the motions for a new trial to be withdrawn in light of this disaffirmance, and resubmitted the matter to the court of appeals (A. 4-8). That court thereafter, on July 12, 1962, *sua sponte*, reinstated the appeals, vacated the convictions and remanded the case to the district court with orders to conduct a new trial (see A. 15). ◊

The court of appeals correctly found that petitioner was responsible for the above-described delay by failing to take advantage of the opportunity afforded him to move for a new trial (A. 15-16). Petitioner's contention (Pet. Br. 23-24) that he cannot be taxed with this delay because by moving for a new trial he would have forfeited his ability to assert a claim of double jeopardy<sup>26</sup> is unsound. Petitioner was not confronted

<sup>26</sup> The court of appeals properly rejected the double jeopardy claim following petitioner's second-trial conviction, deeming the first trial, in which the imposter-attorney participated, to be a nullity (A. 14-15).

with the "Hobson's choice" he asserts since there is no evident reason why he could not have filed the motion for a new trial and at the same time preserved his right to rely upon a defense of double jeopardy. In any event, if the alternatives claimed were real, the strategic choice not to file such a motion and to rely on the double jeopardy defense was his own, for which he can properly be held accountable.

Petitioner also contends that the period from June 1962, when the court of appeals ordered a new trial, to April 1963, when the trial commenced, involved unnecessary delay for which he was not responsible. The docket entries show, however, that following the appointment of counsel for petitioner on October 30, 1962,<sup>27</sup> much of the ensuing delay was caused by pre-trial motions made either by counsel for petitioner or pe-

<sup>27</sup> The docket entries do not indicate the date of withdrawal of Mr. Halper, counsel for petitioner who had been appointed on July 31, 1961, and who had appeared at the hearing on September 14, 1961, to inform the district judge of petitioner's desire to withdraw the motion for a new trial which had been filed on his behalf (see A. 5, 7). Therefore, it is not clear from the record that petitioner, as he asserts (Pet. Br. 25), was without counsel for the entire four-month period between June and October 30, 1962, when new counsel was appointed to represent him. In any event, at least on the date when counsel was furnished, it became petitioner's obligation, if he desired a speedy retrial, to make a demand therefor. *Bayless v. United States*, 147 F. 2d 169, 170 (C.A. 8), cited with approval in *United States v. Ewell*, 383 U.S. 116, 121-122, n. 7; *United States v. Gladding*, 265 F. Supp. 850, 853-855 (S.D.N.Y.).

itioner himself.<sup>28</sup> On January 18, 1963, petitioner's attorney (Mr. David) moved for a trial continuance of two months to March 18, 1963, which was granted. During February Mr. David was relieved, pursuant to petitioner's motion, and new counsel (Mr. Woods) was appointed. That appointment was vacated on March 5, 1963 (the reason does not appear), and Mr. Thomas, petitioner's eventual second-trial counsel, was substituted. On March 29, 1963, petitioner and co-defendant White filed motions to dismiss the indictment. Argument was held and the motions were denied on April 5, 1963. The second trial began on April 22, 1963.

The court of appeals' conclusion that on this record this period of delay could fairly be attributed to petitioner was correct (see A. 15-16, 72, n. 13). Moreover, even if a portion of the period might be attributed to other causes, that is hardly a sufficient basis—in light of the fact that no prejudice has been shown—for overturning petitioner's conviction. *E.g.*, *Reece v. United States*, 337 F. 2d 852 (C.A. 5); *Barnes v. United States*, 347 F. 2d 925 (C.A. 8).

2. *The time taken for appellate review of petitioner's second conviction.* Oral argument in the court of ap-

<sup>28</sup> In describing the reasons for the delay during this period, the court of appeals stated (A. 15-16): "The District Court \* \* \* assigned the case for trial on October 17, 1962. By that date there had been hearings on motions of various court-appointed counsel for leave to withdraw; Harrison had no attorney; Attorney David, appointed October 30, 1962, thereafter sought a continuance contending that he had no transcript of the first trial; Harrison then moved that Attorney David be discharged; motions to dismiss on double jeopardy grounds had been filed and argued; in short, on one basis or other, the District Court was occupied with a series of defense motions, some purportedly of substance, some procedural, but all contributing to delay."

peals on the appeal from the second-trial convictions was had on December 18, 1963.<sup>29</sup> An opinion was rendered by the panel (but not published) in which all of the confessions and admissions of the appellants which had been introduced at the trial were ruled inadmissible, except for the oral admissions of petitioner. On June 1, 1965, the court of appeals, *sua sponte*, determined that the issue of the admissibility of petitioner's oral statement under *Harling v. United States*, 295 F.2d 161 (C.A.D.C.), was sufficiently important to warrant reconsideration *en banc* (A. 12). Reargument *en banc* was had on June 15, 1965, and the full court's decision holding the statement inadmissible in light of *Harling* was announced on December 7, 1965, and the majority and dissenting opinions on this issue were handed down on that date along with the earlier opinion of the original panel (see A. 11-46).

Petitioner's contention that the time thus consumed (a period of approximately two years) deprived him of the right to a speedy trial disregards the exigencies of appellate review of difficult issues in a capital case. A reading of the opinions of the court released on December 7, 1965 (A. 11-46), reveals the number and complexity of the questions considered and disposed of by the court of appeals and illustrates more convincingly than any extended argument the necessity for "the essential ingredient [of] orderly expedition and not mere speed" (*Smith v. United*

<sup>29</sup> The jury verdict was rendered on May 8, 1963 (see A. 13), and the judgment of conviction was entered on June 18, 1963 (A. 9).

*States*, 360 U.S. 1, 10) in this far-from-ordinary case.<sup>30</sup> While the two years thus consumed was substantial, it was not an unreasonably long period of time for the reviewing court to take in rendering its decision, once all the circumstances are considered.

As this Court has recently had occasion to emphasize, "the \* \* \* procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." *United States v. Ewell*, *supra*, 383 U.S. at 120; see also *Beavers v. Haubert*, 198 U.S. 77, 87. Similarly, as the court of appeals pointed out (A. 73), "The time necessarily consumed in unraveling complex issues whose ultimate resolution vindicates the rights of the accused can hardly be said to constitute purposeful or oppressive delay." Petitioner has no justifiable cause for complaint where the time that elapsed was in fact utilized to undertake a painstaking analysis of his legal claims and thus to avoid the "deleterious effect" on his rights that might have resulted from a more hasty analysis. This is particularly so where, as here, no prejudice is shown to have resulted from the challenged delay (see *supra*, pp. 28-29).<sup>31</sup>

<sup>30</sup> As the court below noted (A. 73-74), "One has but to examine the comprehensive opinions the second appeal brought forth to appreciate the court's task and foresee the risk that unwarranted haste might have worked to [petitioner's] disadvantage."

<sup>31</sup> We do not construe petitioner as protesting the reasonableness of the eight and one-half month period needed for the orderly and deliberate consideration by the court of appeals (including the disposal of a petition for rehearing *en banc*) of the issues raised after his instant conviction (see Pet. Br. 26).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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FEBRUARY 1968.

MAR 12 1968

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 876

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EDDIE M. HARRISON,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF FOR THE PETITIONER

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**REPLY BRIEF FOR THE PETITIONER**

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**I.**

**The Government Has Failed to Come to Grips With the Fundamental First Question Raised by This Appeal—Whether Testimony Compelled by Erroneous Admission of Illegally Obtained Confessions Can Be Used at a Subsequent Trial Despite the Fifth Amendment's Prohibition Against Compelled Testimony and the Principle That the Government May Not Use the Fruit of Its Own Wrongdoing to Secure Conviction.**

The Government argues that the “petitioner’s second-trial testimony was not ‘compelled’” because it was the product of the Government’s strong case, not the errone-

ous admission of the confessions. This is a mere play on words because the Government's "strong case" *was* the confessions and precious little else.

The Government concedes, as it must, that a defendant's testimony may not be used against him at a subsequent trial if that "testimony has been impelled by the knowledge that he will suffer a significant detriment" by not speaking, but argues that "Here there was no significant detriment which petitioner would suffer through a failure to become a witness at his second trial" because "Petitioner, by relying on his objections to the introduction of his inculpatory statements, could have adequately preserved his constitutional challenge to the propriety of that evidence and could thus have insured a retrial by prevailing, if his objections were well founded, on appeal." (Government Brief, pp. 13-14). Two factual problems with this argument are immediately apparent: (1) the petitioner could not have raised the objection that his confessions were obtained by threats (Government Brief, p. 23) without testifying and (2) the validity of the petitioner's other objections to admission of the confessions (ultimately sustained on appeal) was by no means certain at the time of the trial, a point which the Government subsequently argues at some length.<sup>1</sup> But the more basic objection to the Government's argument is that it ignores the main question, which is whether the introduction of the confessions put the petitioner under pressure to testify. That

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<sup>1</sup> Government Brief, pp. 25, 32-34. It demands a great deal of court-appointed trial counsel to require him to be sure he is correct on a point of law that the Government denies, that the trial judge calls "close" (2 Tr. 499-504) and that the Court of Appeals took two years to decide because of its "complexity." The Government itself seems to suggest as much. (Government Brief, p. 26, n. 23).

it did seem too clear for cavil. If undisputed, the confessions spelled certain conviction in a capital case. The detriment of such a conviction seems plain enough to except the petitioner from "the fundamental principle that a defendant must be held accountable for his [voluntary] testimony." (Government Brief, p. 14). That the petitioner succumbed to this improper pressure does not serve either to excuse that pressure or to make him more "accountable" for the words so obtained than is the victim of any other improper pressure who might conceivably have resisted it but failed to do so.

However, the Government argues that the record shows the petitioner's testimony was not the "fruit" of its use of the illegally obtained confessions but of the petitioner's trial strategy, as evidenced by his counsel's remarks to the jury in his opening statement and in summation. These remarks, the Government argues, reveal that counsel did not intend at the outset of the trial to put the petitioner on the stand, despite foreknowledge of the existence of the confessions, but planned to destroy the Government's case by cross-examination, and that his failure to achieve the desired results on cross-examination caused him to reverse his position and put the petitioner on the stand.

Accepted at face value this argument seems to support the petitioner's view of the case rather than the Government's. Counsel's announced trial strategy was to keep the petitioner off the stand, and that decision was reversed, according to the Government's view, because cross-examination of the Government's witnesses revealed that the petitioner's testimony was needed to dispute the confessions.<sup>2</sup>

<sup>2</sup> There is no reason to assume, as the Government argument seems to, that when counsel made his opening statement he knew his objections to admission of the confessions would be overruled.

In short, the Government seems to have demonstrated "something which is essentially beyond proof—that petitioner was placed in the position of having to choose between relying on his [overruled] objections and taking the witness stand to try to reduce the 'certainty' (see Pet. Br. 14) of an adverse verdict . . . ." (Government Brief, p. 15).

This compulsion, however, is excused by the Government because the prosecutor and the judge were acting in good faith, and the Government "cannot accept petitioner's implicit assumption that some kind of exclusionary rule should apply to a defendant's testimony given in response to evidence admitted through innocent prosecutorial or judicial error." (Government Brief, p. 24).<sup>3</sup> Such an argument might do if the only purpose of exclusionary rules were to police federal prosecutors and judges. But such policing is only one small aspect of the fundamental objective of exclusionary rules, which is to protect the rights of the accused and provide him a fair trial. Confronting the petitioner with inadmissible confessions was a basic violation of his rights that deprived him of a fair trial however innocent the error. And use of testimony obtained by this means was direct "exploitation of that illegality," in the words quoted by the Government from *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).<sup>4</sup> It is simply not true, as the Government argues, that "the effects of that illegal-

<sup>3</sup> Cf. Griswold, *The Fifth Amendment Today*, Harvard University Press, p. 7 (1955): "But torture was once used by honest and conscientious public servants . . . ."

<sup>4</sup> In view of the Government's argument on pages 19 and 20 concerning the distinction between "live witness testimony" and "inanimate evidence," it should be noted that the *Wong Sun* case dealt with "live" statements as well as seized narcotics. See, e.g., 371 U.S. at 485-88.

ity were erased by the reversal of petitioner's conviction on appeal and the grant of a new trial from which the illegally obtained statements were excluded." (Government Brief, pp. 25-26). Rather, "the effects of that illegality" were used to render that new trial a nullity and obtain the petitioner's reconviction.

## II.

**The Government Has Failed to Show Adequate Excuse for the Failure to Provide the Petitioner the Speedy Trial Guaranteed Him by the Sixth Amendment.**

The Government provides three answers to the petitioner's speedy trial argument: (1) that his ability to conduct his defense was not prejudiced; (2) that he was responsible for much of the delay at the trial level; and (3) that the time spent on appellate review was not unreasonably long. Each merits brief comment.

### 1. THE PREJUDICE TO THE PETITIONER

The Government argues that "one essential element is that the person claiming denial of the right to a speedy trial show that some material prejudice has resulted," citing this Court's opinion in *United States v. Ewell*, 383 U.S. 116, 122 (1966), and two cases from the D. C. Circuit. However, that circuit has made plain its view that the right of speedy trial

"affords essentially a dual protection: against prejudice to a defendant's defense, and against prejudice to his person." *Hedgepeth v. United States*, 365 F.2d 952, 955 (D. C. Cir. 1966).

ating The dual nature of the right is also recognized by this Court's opinion in *United States v. Ewell, supra* at 120, where impairment of a petitioner's defense was listed as one purpose of that right, along with prevention of "undue and oppressive incarceration prior to trial" and minimizing the prisoner's "anxiety and concern." Nothing in the wording or the history of the Sixth Amendment supports the narrow interpretation the Government urges, nor does reason. The fact that a prisoner's defense might not be prejudiced by holding him indefinitely without a trial would not justify such a course, nor square it with the Sixth Amendment command of a speedy trial.

Another case cited by the Government, *Hedgepeth v. United States*, 364 F.2d 684 (D. C. Cir. 1966), states the rule quite the opposite of what the Government would have it. There the Court pointed out that "prejudice is considered to be presumed from, or necessarily inherent in, a long delay. *Petition of Provo*, 17 F.R.D. 183, 203 (D. Md.), affirmed *per curiam*, 350 U.S. 857 . . . ." and stated further:

"The possibility of prejudice from the delay is an important factor in close cases. But the very assumption of the Sixth Amendment is that unreasonable delays are by their nature prejudicial. It is not generally necessary for the defendant to demonstrate affirmatively how he has been prejudiced by an unreasonable delay." 364 F.2d at 687, n.3.

The petitioner believes that the delay in his case was unreasonably long and unnecessary and that the prejudice of six years' imprisonment before his last trial is alone sufficient to sustain his claim of denial of his right of speedy

trial. However, it is also apparent that he has sustained other prejudice. The fact that the Government witnesses had become unavailable prior to the third trial deprived the petitioner of his opportunity to cross-examine them, a point of considerable importance notwithstanding the fact that the opportunity had been afforded at a previous trial. And the mere fact that the Government's testimony was largely read from a prior transcript emphasized to the jury that this was a re-trial and perhaps suggested that the petitioner had been previously found guilty of the charge and was a criminal whose conviction had been reversed because of what the local newspapers frequently berate as technicalities and softness on the part of the appellate courts.<sup>5</sup>

## 2. RESPONSIBILITY FOR TRIAL DELAYS

The Government attributes to the petitioner much of the delay between his first and second trials. In doing so it errs factually as to certain points to be discussed subsequently. But first the petitioner would challenge the underlying premise of the Government's argument, i.e., that delay not occasioned by the Government can be disregarded. Again the *Hedgepeth* case, *supra*, speaks against the Government:

"Although we agree with the Government that the delay up to March 15, 1965, is fairly attributable to the appellant and does not, in itself, constitute denial of a speedy trial, this does not mean that this period is to be disregarded. The passing of such a consider-

<sup>5</sup> As much was perhaps suggested by the prosecutor's closing argument. See 3 Tr. 137-38, 141, 177.

able length of time, no matter who is 'at fault,' should act as a spur to the Government to seek prompt trial. If the Government is lax in this regard, it is appropriate to take the earlier period into account in determining whether there has been a denial of the right to a speedy trial."\*

Here the Government was not merely "lax" in seeking an expeditious trial, it actually opposed the granting of a new trial to the petitioner. (A. 6). And while the Government now sees "no evident reason why [t]he [petitioner] could not have filed the motion for a new trial and at the same time preserved his right to rely upon a defense of double jeopardy" (Government Brief, p. 31), the Government argued to the contrary at the time when the petitioner was sitting on death row confronted with the "Hobson's choice" the Government now asserts did not exist. (A. 7).

Moreover, the Government here seeks to attribute other delay to the petitioner that could not even arguably be his fault. The particulars are:

(a) The Government asserts that "The docket entries do not indicate the date of withdrawal of Mr. Halper, counsel for petitioner who had been appointed on July 31, 1961 . . . " and that "Therefore it is not clear from the record that petitioner, as he asserts (Pet. Br. 25), was without counsel for the entire four-month period between

\* 364 F.2d at 688. See also the opinion of another panel of the same court in *Hedgepeth v. United States*, 365 F.2d 952, 954 (D.C. Cir. 1966), where the same judge wrote that "the fact that this delay is attributable to appellant does not mean that it is to be disregarded in considering whether a speedy trial was denied if there is an additional delay for which appellant is not responsible."

June and October 30, 1962, when new counsel was appointed to represent him." (Government Brief, p. 31, n.27). While the assertion as to the docket entries is true insofar as the record in this Court is concerned, lower court records indicate that on March 14, 1962, Mr. Halper moved to withdraw as counsel on the ground that he was physically unable to render efficient and adequate representation and this motion was granted on March 16, 1962. Moreover, the Court of Appeals Order of June 12, 1962, which is in the record in this Court, specifically recited that counsel for the petitioner had withdrawn.

(b). The Government asserts that "On January 18, 1963, petitioner's attorney (Mr. David) moved for a trial continuance of two months to March 18, 1963, which was granted." (Government Brief, p. 32). It is a fact that on January 17, 1963, the petitioner's appointed counsel sought a 30-day continuance because he had been unable to obtain a transcript of the first trial. Whether delay in furnishing needed transcript in a *forma pauperis* case is properly attributable to the prisoner is at least questionable. But even if it is, the delay *requested* was only one month out of the ten months involved between the time the Court of Appeals ordered a new trial and the time when that trial was actually held.

(c) The recitation in the Government's brief (p. 32) leaves the impression that argument of the petitioner's motion to dismiss on March 29, 1963, caused further postponement of the trial to April 22, 1963. That is not so. Before that argument the trial was set for April 8, 1963.<sup>1</sup>

<sup>1</sup> The postponement from March 18, 1963, to April 8, 1963, came on February 27, 1963. On that day the Chief Judge sent a letter to the clerk advising that he was relieving Harrison's appointed

The delay to April 22, as the Government has previously admitted, was occasioned by the imminence of the court's Easter recess.\* The case was set for April 8, Easter was April 14, and the continuance was from April 8 to April 22, 1963.

In light of the foregoing it is not factually correct to say, as the Government does, that "The court of appeals' conclusion that on this record this period of delay ["from June 1962, when the court of appeals ordered a new trial, to April 1963, when the trial commenced" (Government Brief, p. 31)] could fairly be attributed to petitioner was correct." (Government Brief, p. 32).

### 3. TIME TAKEN FOR APPELLATE REVIEW

The petitioner has already expressed his view that his case did not require the time it actually took in the Court of Appeals, and will not repeat here what is said in his original brief. One point, however, should be clarified. The Government says:

"We do not construe petitioner as protesting the reasonableness of the eight and one-half month period needed for the orderly and deliberate consideration by

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counsel (Mr. Woods) due to the press of private business and continuing the trial three weeks, from March 18 to April 8. This delay wasn't the prosecutor's fault, but neither was it the petitioner's since it stemmed solely from the court's relieving an appointed counsel due to the press of his private business.

\* See "Supplement to Appellee's Brief" filed December 16, 1963, p. 4, where the Government recited: "April 5, 1963: Trial date continued from April 8 to April 22, 1963. The transcript of this proceeding (supplemental record on appeal) suggests that the case was continued because of the imminence of the Easter recess."

the court of appeals (including the disposal of a petition for rehearing *en banc*) of the issues raised after his instant conviction (see Pet. Br. 26)." (Government Brief, p. 34, n.31).

Counsel apologizes for misleading the Government on this score. Actually the petitioner's speedy trial point is twofold: (1) that the case should have been dismissed prior to his third trial for violation of his right to a speedy trial and (2) that the indictment should now be dismissed if the petitioner prevails on his first point in this Court because the time has long since passed when he could be afforded the speedy trial to which he was entitled. To this second point the delay involved in the petitioner's most recent appeal is pertinent as is every day now passing while he sits in jail without having had a fair trial some eight years after indictment.

Respectfully submitted,

ALFRED V. J. PRATHER  
Counsel for Petitioner by  
Appointment of this Court

# SUPREME COURT OF THE UNITED STATES

No. 876.—OCTOBER TERM, 1967.

Eddie M. Harrison, Petitioner,  
v.  
United States.

On Writ of Certiorari  
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the District of Colum-  
bia Circuit.

[June 10, 1968.]

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was brought to trial before a jury in the District of Columbia upon a charge of felony murder.<sup>1</sup> At that trial the prosecution introduced three confessions allegedly made by the petitioner while he was in the custody of the police. After these confessions had been admitted in evidence, the petitioner took the witness stand and testified to his own version of the events leading to the victim's death. The jury found the petitioner guilty, but the Court of Appeals reversed his conviction, holding that the petitioner's confessions had been illegally obtained and were therefore inadmissible in evidence against him. *Harrison v. United States*, 359 F. 2d 214, 222; on rehearing *en banc*, 359 F. 2d 223.<sup>2</sup>

The substance of the confessions was that the petitioner and two others, armed with a shotgun, had gone to the victim's house intending to rob him, and that the victim had been killed while resisting their entry into

<sup>1</sup> An earlier conviction had been vacated on appeal. See n. 4, *infra*.

<sup>2</sup> Two of the confessions were found to have been obtained in violation of *Mallory v. United States*, 354 U. S. 449. The third was found to have been obtained in violation of a prior *en banc* decision of the Court of Appeals, *Harling v. United States*, 295 F. 2d 161. See n. 6, *infra*.

his home. In his testimony at trial the petitioner said that he and his companions had gone to the victim's home hoping to pawn the shotgun, and that the victim was accidentally killed while the petitioner was presenting the gun to him for inspection.

Upon remand, the case again came to trial before a jury. This time the prosecutor did not, of course, offer the alleged confessions in evidence. But he did read to the jury the petitioner's testimony at the prior trial—testimony which placed the petitioner, shotgun in hand, at the scene of the killing. The testimony was read over the objection of defense counsel, who argued that the petitioner had been induced to testify at the former trial only because of the introduction against him of the inadmissible confessions. The petitioner was again convicted, and the Court of Appeals affirmed.<sup>3</sup> We granted certiorari to decide whether the petitioner's trial testimony was the inadmissible fruit of the illegally procured confessions.<sup>4</sup>

In this case we need not and do not question the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in

<sup>3</sup> 387 F. 2d 203.

<sup>4</sup> 389 U. S. 969. The petitioner's further contention that he was denied the right to a speedy trial is wholly without merit and was properly rejected by the Court of Appeals. See 387 F. 2d, at 206-208. The petitioner was indicted more than eight years ago and has been tried and convicted three times for the offense here involved. His first conviction was vacated on appeal when it became clear that the man who had represented him in certain post-verdict proceedings was an ex-convict posing as an attorney, see 359 F. 2d 214, 216-217; his second conviction was reversed because the Government employed inadmissible confessions against him on retrial, see 359 F. 2d 214, 222, 223; and his third conviction is presently before us. Virtually all of the delays of which the petitioner complains occurred in the course of appellate proceedings and resulted either from the actions of the petitioner or from the need to assure careful review of an unusually complex case.

later proceedings.<sup>5</sup> A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him.

Here, however, the petitioner testified only after the Government had illegally introduced into evidence three confessions, all wrongfully obtained,<sup>6</sup> and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby—the fruit of the poisonous tree, to invoke a time-worn metaphor. For the “essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.” *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392.<sup>7</sup>

In concluding that the petitioner's prior testimony could be used against him without regard to the confessions that had been introduced in evidence before he

<sup>5</sup> See, e. g., *Edmonds v. United States*, 273 F. 2d 108, 112–113; *Ayres v. United States*, 193 F. 2d 739, 740–741. And see generally, C. McCormick, *Evidence*, §§ 131, 230–235, 239 (1954).

<sup>6</sup> In the present posture of this case, the earlier holding of the Court of Appeals that the petitioner's confessions were illegally obtained, see 359 F. 2d 214, 222, 223, is not in dispute. We therefore proceed upon the assumption that the Court of Appeals was correct in ruling the confessions inadmissible, but we intimate no view upon how we would evaluate that ruling if it were properly before us.

<sup>7</sup> See also *Nardone v. United States*, 308 U. S. 338, 341; *Wong Sun v. United States*, 371 U. S. 471, 484–488. Cf. *Fahy v. Connecticut*, 375 U. S. 85, 91. See also the opinions of Chief Justice Traynor in *People v. Jackson*, 67 Adv. Cal. 91, 95, 429 P. 2d 600, 603, and *People v. Polk*, 63 Cal. 2d 443, 449, 406 P. 2d 641, 644, and the opinions of Justice Tobriner in *People v. Spencer*, 66 Cal. 2d 158, 164–169, 424 P. 2d 715, 719–724, and *People v. Bilderbach*, 62 Cal. 2d 757, 763–768, 401 P. 2d 921, 924–927.

testified, the Court of Appeals relied on the fact that the petitioner had "made a conscious tactical decision to seek acquittal by taking the stand after [his] in-custody statements had been let in . . . ."<sup>8</sup> But that observation is beside the point. The question is not *whether* the petitioner made a knowing decision to testify, but *why*. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible.<sup>9</sup> As Justice Tobriner wrote for the Supreme Court of California,

"If the improper use of [a] defendant's extrajudicial confession impelled his testimonial admission of guilt, . . . we could not, in order to shield the resulting conviction from reversal, separate what he told the jury on the witness stand from what he confessed to the police during interrogation."<sup>10</sup>

<sup>8</sup> 387 F. 2d 203, 210.

<sup>9</sup> We have no occasion in this case to canvass the complex and varied problems that arise when the trial testimony of a witness other than the accused is challenged as "the evidentiary product of the poisoned tree." R. Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness*, 15 U. C. L. A. Law Rev. 32, 44 (1967). See also Comment, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. Pa. L. Rev. 1136, 1143-1153 (1967). Compare *United States v. Wade*, 388 U. S. 218, 241; *Gilbert v. California*, 388 U. S. 263, 272-273. And, contrary to the suggestion made in a dissenting opinion today, *post*, at —, we decide here only a case in which the prosecution illegally introduced the defendant's confession in evidence against him at trial in its case-in-chief.

<sup>10</sup> *People v. Spencer*, *supra*, 66 Cal. 2d, at 164, 424 P. 2d, at 719-720.

It is argued in dissent that the petitioner's trial testimony should not be suppressed "even if it was in fact induced by the wrongful admission into evidence of an illegal confession," *post*, at —, since any deterrence such suppression might achieve is insufficient to warrant placing new "obstacles . . . in the path of policeman,

The remaining question is whether the petitioner's trial testimony was in fact impelled by the prosecution's wrongful use of his illegally obtained confessions. It is, of course, difficult to unravel the many considerations that might have led the petitioner to take the witness stand at his former trial. But, having illegally placed his confessions before the jury, the Government can hardly demand a demonstration by the petitioner that he would have testified as he did even if his inadmissible confessions had not been used. "The springs of conduct are subtle and varied," Mr. Justice Cardozo once observed. "One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others."<sup>11</sup> Having "released the spring" by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony.<sup>12</sup>

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prosecutor, and trial judge alike." *Post*, at —. Of course, no empirical evidence on the deterrence issue is available. And "[s]ince as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled." *Elkins v. United States*, 364 U. S. 206, 218. But it is not deterrence alone that warrants the exclusion of evidence illegally obtained—it is "the imperative of judicial integrity." *Id.*, at 222. The exclusion of an illegally procured confession and of any testimony obtained in its wake deprives the Government of nothing to which it has any lawful claim and creates no impediment to legitimate methods of investigating and prosecuting crime. On the contrary, the exclusion of evidence causally linked to the Government's illegal activity no more than restores the situation that would have prevailed if the Government had itself obeyed the law.

<sup>11</sup> *De Cicco v. Schweizer*, 221 N. Y. 431, 438, 117 N. E. 807, 810.

<sup>12</sup> See *People v. Spencer*, *supra*, 66 Cal. 2d, at 168, 424 P. 2d, at 722. As MR. JUSTICE HARLAN recently observed, "when the prosecution seeks to use a confession uttered after an earlier one not found to be voluntary, it has . . . the burden of proving . . . that the later confession . . . was not directly produced by the

No such showing has been made here. In his opening statement to the jury, defense counsel announced that the petitioner would not testify in his own behalf. Only after his confessions had been admitted in evidence did he take the stand. It thus appears that, but for the use of his confessions, the petitioner might not have testified at all.<sup>13</sup> But even if the petitioner would have decided to testify whether or not his confessions had been used, it does not follow that he would have admitted being at the scene of the crime and holding the gun when the fatal shot was fired. On the contrary, the more natural inference is that no testimonial admission so damaging would have been made if the prosecutor had not already spread the petitioner's confessions before the jury.<sup>14</sup> That is an inference the Government has not dispelled.

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existence of the earlier confession." *Darwin v. Connecticut*, 391 U. S. —, — (concurring in part and dissenting in part). The same principle compels the conclusion that, when the prosecution seeks to use testimony given after the introduction in evidence of a confession unlawfully obtained, it has the burden of proving that the defendant's testimony was not produced by the illegal use of his confession at trial. Compare *Chapman v. California*, 386 U. S. 18, 24: "Certainly error . . . in illegally admitting highly prejudicial evidence . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless."

<sup>13</sup> "In evaluating the possibility that the erroneous introduction of [a] defendant's extrajudicial confession might have induced his subsequent testimonial confession, we must assess [the] defendant's reaction to the use of his confession at trial on the basis of the information then available to him . . ." *People v. Spencer*, *supra*, 66 Cal. 2d, at 165, 424 P. 2d, at 720.

<sup>14</sup> Compare *United States v. Bayer*, 331 U. S. 532: "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first." *Id.*, at 540 (dictum). Compare also *Darwin v.*

It has not been demonstrated, therefore, that the petitioner's testimony was obtained "by means sufficiently distinguishable" from the underlying illegality "to be purged of the primary taint." *Wong Sun v. United States*, 371 U. S. 471, 488. Accordingly, the judgment must be

*Reversed.*

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*Connecticut*, *supra*, 391 U. S. —, —; *id.*, at — (separate opinion of MR. JUSTICE HARLAN); *Beecher v. Alabama*, 389 U. S. 35, 36, n. 2; *Clewis v. Texas*, 386 U. S. 707, 710.

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v.  
United States.

On Writ of Certiorari  
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Court of Appeals for  
the District of Colum-  
bia Circuit.

[June 10, 1968.]

MR. JUSTICE BLACK, dissenting.

It seems to me that the Court in this case carries the Court-made doctrine of excluding evidence that is "fruit of the poisonous tree" to a wholly illogical and completely unreasonable extent. For this and many of the reasons suggested by my Brother WHITE's dissent, I agree that holdings like this make it far more difficult to protect society "against those who have made it impossible to live today in safety." I would *affirm* this conviction.

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[June 10, 1968.]

MR. JUSTICE HARLAN, dissenting.

Like my Brother BLACK and my Brother WHITE, I am unable to understand why the Court reverses this petitioner's conviction. There is no suggestion that the testimony in question, given on the stand with the advice of counsel, was somehow unreliable. Nor, as the opinion of Mr. JUSTICE WHITE amply demonstrates, is there any plausible argument that a rule excluding such evidence from use at a later trial adds an ounce of deterrence against police violation of the *Mallory* rule.

I do not doubt that "voluntariness" is not always a purely subjective question as to the defendant's state of mind; it may involve an objective analysis of the fairness of the situation in which government agents placed him. Nor would I rule out the possibility that a direct product of unlawful official activity might properly be excludable as a fruit of that activity—even where the product is so unforeseeable that a deterrent rationale for exclusion will not suffice—on the ground that the Government should not play an ignoble part.

But these concepts do not reach this case. Here, apparently in all good faith, the Government offered at one trial an out-of-court confession by petitioner. It was objected to on the ground that it had been obtained in violation of the *Mallory* rule. That objec-

tion was overruled, and the defense had to decide how to proceed. While defense counsel may have believed he had good grounds for reversal on appeal (as the Court of Appeals later held he did) he also had to present a defense in an effort to persuade the jury to acquit. That defense had of course to be structured to meet the Government's case as it stood—including but not limited to the admitted confession—and counsel decided to put his client on the stand.\*

The situation was one that criminal and civil defendants face all the time: believing that error has been committed that will result in reversal on appeal, they must nevertheless present a defense, and in doing so may help the other side on retrial. The situation here is no different in principle from the sacrifice of surprise, or the conveyance of important leads to the other side, that may occur because a trial continues even after error has been committed. It is a price that is paid for having a system of justice that insists, generally, upon full trials before appellate review of points of law. It is a problem that can be avoided, within our system, only by doing what is done here, namely, reaching the wrong result as between the litigants. For me this is not acceptable doctrine.

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\*This case is altogether different from *Darwin v. Connecticut*, — U. S. —, in which I took the position that when a first confession is involuntary a later confession produced by the erroneous impression that the cat was already out of the bag should also be considered involuntary. Here (1) petitioner's out-of-court confession was not involuntary; (2) petitioner's in-court statements were given upon the advice of counsel, and there is no indication whatever that petitioner misunderstood the position he was in; (3) the in-court testimony could not possibly have been thought merely cumulative of the confession, for it (a) was given in order to rebut the confession and (b) damaged petitioner's position in a manner quite independent of the use of the confession.

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[June 10, 1968.]

MR. JUSTICE WHITE, dissenting.

This case and others like it would be more comprehensible if they purported to make procedures for trying criminals more reliable for finding facts and minimizing mistakes. Cases like *United States v. Wade*, 388 U. S. 218 (1967); *Gilbert v. California*, 388 U. S. 263 (1967); and *Bruon v. United States*, — U. S. — (1968), for example, at least could claim this redeeming virtue. But here, as in *Miranda v. Arizona*, 384 U. S. 436 (1966), decision has emanated from the Court's fuzzy ideology about confessions, an ideology which is difficult to relate to any provision of the Constitution and which excludes from the trial evidence of the highest relevance and probity.

Three times petitioner has been convicted of murdering his robbery victim with a shotgun. The first trial was in 1960. At the second trial in 1963, written and oral statements by petitioner and his codefendants were introduced. Petitioner then took the stand and gave his version of the events leading to the killing. He admitted being at the scene of the crime. Conviction followed. The Court of Appeals again reversed, this time on the ground that petitioner's statements were wrongfully admitted, not because they were involuntary or in any way coerced, but because they violated *Mallory v.*

*United States*, 354 U. S. 449 (1957), and recent decisions of the Court of Appeals in *Killough v. United States*, 336 F. 2d 929 (C. A. D. C. Cir. 1964), and *Harling v. United States*, 295 F. 2d 161 (C. A. D. C. Cir. 1961). By the time of the third trial in 1966, prosecution witnesses were dead or unavailable. Considerable reliance was placed on the testimony which had been given at the second trial, including petitioner's admissions when he took the stand in his own defense. Harrison was convicted for a third time. It is this conviction which the Court now reverses, contrary to the judgment of the Court of Appeals. That court found no reason to exclude petitioner's voluntary statements, made under oath in open court and with the advice of counsel.

There is no suggestion that petitioner's testimony at his second trial was untruthful or unreliable. Nor does the Court hold that Harrison was compelled to take the stand and incriminate himself contrary to his privilege under the Fifth Amendment. The reason is obvious. If a defendant were held to be illegally "compelled" when he takes the stand to counter strong evidence offered by the prosecution and admitted into evidence, he would be as much "compelled" whether it was error to admit the evidence or not. To avoid this absurd construction of the Self-Incrimination Clause, the Court casts about for a different label. Harrison's testimony at the second trial, the Court now says, was not "compelled" but only "impelled" by the confessions. Alternatively it suggests that except for the confessions Harrison would not have taken the stand and admitted being at the scene of the crime. On either basis, his testimony at the second trial is deemed a fruit of illegally obtained confessions from which the Government should be permitted no benefit whatever. I disagree.

The doctrine that the "fruits" of illegally obtained evidence cannot be used to convict the defendant is com-

plex and elusive. There are many unsettled questions under it. The Court, however, seems to overlook all of these problems in adopting an overly simple and mechanical notion of "fruits" to which I can not subscribe. In the view of the Court, if some evidentiary matter is causally linked to some illegal activity of the Government—linked in that broad "but for" sense of causality which rarely excludes relevant matters which come later in time—it is a "fruit" and excludable as such. This strictly causal notion of fruits is, of course, consistent with the dictum in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392 (1920), that "[i]f knowledge of [the facts] is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it . . . ." In *Silverthorne*, however, the "fruits" were copies and photographs of original documents illegally seized; it would be difficult to imagine a case where the fruits hung closer to the trunk of the poison tree. The Court seems to overlook the critical limitation placed upon the fruits doctrine in *Nardone v. United States*, 308 U. S. 338, 341 (1939), where Mr. Justice Frankfurter stated that:

"Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."

Cf. *Wong Sun v. United States*, 371 U. S. 471, 487-488 (1963); *United States v. Wade*, 388 U. S. 218, 239-242 (1967). The concept implicit in the quoted statement, as I understand it, is that mere causal connection is insufficient to make something an inadmissible fruit. Rather it must be shown that suppression of the fruit would serve the same purpose as suppression of the illegal

evidence itself. When one deals with the fruits of an illegal search or seizure, as in *Silverthorne*, or with the fruits of an illegal confession, as the Court below decided that we do in this case,<sup>1</sup> the reason for suppression of the original illegal evidence itself is prophylactic—to deter the police from engaging in such conduct in the future by denying them its past benefits. See *Linkletter v. Walker*, 381 U. S. 618, 634–639 (1965). Since deterrence is the only justification for excluding the original evidence, there is no justification for excluding the fruits of such evidence unless suppression of them will also serve the prophylactic end. I deem this the crucial issue, and proper resolution of it requires a different result from that to which the Court has bulled its way.

As the Court makes plain, it is “difficult to unravel the many considerations that might have led the petitioner to take the witness stand . . . .” *Ante*, at 4. Given the difficulty of determining after the fact why the petitioner took the stand, it would seem patent that at the confession stage the police would be wholly without a basis for predicting whether the defendant would be more likely to waive his privilege against self-incrimination and take the stand if they were to obtain a confession than if they were not. Accordingly, it cannot realistically be supposed that the police are spurred on to greater illegality by any rational supposition that success in that illicit endeavor will make it more likely that the defendant will make incriminatory admissions on the witness stand. If this is the case, and I see no grounds

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<sup>1</sup> The essential predicate for excluding petitioner’s testimony is the illegality of his confessions. That issue, seemingly a condition precedent to reversal, the Court avoids. It simply assumes, without deciding, both that the confessions were properly rejected by the Court of Appeals and that the prior decisions of the Court of Appeals in *Killough* and *Harling* were correctly decided. I would not reverse without reaching those questions.

for doubting that it is, then suppression of the petitioner's testimony, even if it was in fact induced by the wrongful admission into evidence of an illegal confession, does not remove a source of further temptation to the police to violate the Constitution.<sup>2</sup>

Even if it were true that the rule adopted by the Court served some minimal deterrent function, I would not be able to join the Court. Marginal considerations such as these, especially when one is dealing with confessions excludable because of violation of the technical requirements of cases like *Mallory v. United States*, 354 U. S. 449 (1957); *Massiah v. United States*, 377 U. S. 201 (1964); *Escobedo v. Illinois*, 378 U. S. 478 (1964); and *Miranda v. Arizona*, 384 U. S. 436 (1966), are insufficient to override the interest in presenting all evidence which is relevant and probative. When one adds the fact that in this case, as in most others where the issue will now

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<sup>2</sup> "The purpose of depriving the government of any gain is to remove any incentive which exists toward the unlawful practice. The focus is forward—to prevent future violations, not punish for past ones. Consequently, where the chain between the challenged evidence and the primary illegality is long or the linkage can be shown only by 'sophisticated argument,' exclusion would seem inappropriate. In such a case it is highly unlikely that the police officers foresaw the challenged evidence as a probable product of their illegality; thus it could not have been a motivating force behind it. It follows that the threat of exclusion could not possibly operate as a deterrent in that situation. Absent this, exclusion carries with it no benefit to society and should not prejudice society's case against a criminal." Comment, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. Pa. L. Rev. 1136, 1148-1149 (1967). In the past the Court has shown greater appreciation of the significance of the deterrence element as well as of the causal element, for both must be present to present a substantial question for this Court. See *Smith v. United States*, 324 F. 2d 879 (C. A. D. C. Cir. 1963), cert. denied, 377 U. S. 954 (1964); *Harlow v. United States*, 301 F. 2d 361 (C. A. 5th Cir.), cert. denied, 371 U. S. 814 (1962).

arise, the defendant took the stand only upon advice of counsel, the argument from deterrence seems virtually to vanish altogether. Police now know that interrogation without warnings will void a confession, and the Federal Government at least is apprised that unduly long detention prior to arraignment will invalidate a confession obtained during the detention period. When this knowledge is coupled with their realization that a defendant's subsequent act of taking the stand to diminish the impact of an improperly admitted confession is guided by the advice of counsel, we have a situation in which the inducements to the police to refrain from illegality are already so clear and so strong that excluding testimony as the Court does in this case cannot conceivably be thought to decrease illegal conduct by the police. The police will know that if they fail to give warnings or detain the prisoner too long, any confession thus obtained will be unusable and that timely and effective objection to it will be taken as soon as the defendant acquires a lawyer. In such circumstances they could not reasonably believe that the confession will ever actually induce the defendant to take the witness stand. In short, the fact that the defendant has counsel who gives him specific advice deprives the Court's fruits argument of the last vestige of deterrence. Of course, in a situation where the illegality of the methods used to obtain the initial evidence is open to doubt, as was true in this case, the fact that the defendant has counsel has little if any effect on the deterrence value of excluding the fruits. Even in such a case, however, I find the deterrence value of such exclusion too minimal. In any event it is clear that the deterrence value in such cases provides insufficient justification for the general rule which the Court adopts today.

I am deeply concerned about the implications of the Court's unexplained and unfounded decision. If Har-

rison's trial testimony was tainted evidence because induced by an illegal confession, then it follows, as the Court indicates by quoting from *People v. Spencer*, 66 Cal. 2d 158, 164, 57 Cal. Rptr. 163, —, 424 P. 2d 715, — (1967), that Harrison's testimony would be automatically excluded even if the confessions had not been admitted. Similarly, an inadmissible confession preceding a plea of guilty would taint the plea. And, as a final consequence, today's decision would seem to bar the use of confessions defective under *Miranda* or *Mallory* from being used for impeachment when a defendant takes the stand and deliberately lies. All these results would seem to flow necessarily from the Court's adoption of a test for inadmissible fruits which relies only upon the existence of a causal link between the original evidence seized illegally and any subsequent product of it. Since precluding the prosecution from any of these uses will not serve the prophylactic end which alone justifies the exclusion of the original illegal evidence, and because all of these uses of evidence admittedly of relevance and high probative value are important to the overriding goal of criminal law—the just conviction of the guilty—I must dissent.

The Court compounds its substantive error today by the procedural ploy of switching the burden of proof to the prosecution. It rules that once it is shown that the defendant testified after inadmissible confessions were used, "the Government must show that its illegal action did not induce his testimony." This despite the fact that the only person with actual knowledge of the subtle and varied "springs of conduct" which caused the defendant to take the stand is the defendant himself. This despite the fact that only five years ago this Court clearly affirmed the traditional rule that the defendant bears the burden of showing that the evidence complained of was an inadmissible fruit of illegality. *Fahy v. Connecticut*, 375 U. S. 85, 91 (1963). See *Nardone*

v. *United States*, 308 U. S. 338, 341 (1939). This switch in the burden can be justified only by the Court's misguided desire to exclude important evidence for which it has somehow acquired a constitutional distaste. Because I reject the end which the Court seeks to serve, I cannot endorse this naked manipulation of means to achieve that end.

Given the Court's current ideology about confessions, there is perhaps some logic on the side of the Court. But common sense and policy are squarely opposed. The important human values will not be served by the obstacles which the Court now places in the path of policeman, prosecutor, and trial judge alike. Criminal trials will simply become less effective in protecting society against those who have made it impossible to live today in safety.